INSTITUTTET FOR SAMMENLIGNENDE KULTURFORSKNING

SERIE A: FORELESNINGER

III.

SIR PAUL VINOGRADOFF:
CUSTOM AND RIGHT

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BY

SIR PAUL VINOGRADOFF
D. C. L., F. B. A.
CORPUS PROFESSOR OF JURISPRUDENCE
IN THE UNIVERSITY OF OXFORD

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human relations does not present the same immutable laws and ever recurring sequences characteristic of natural science: it seems to flow like a stream from inconspicuous sources along a varied course to an unknown sea. Social combinations, even when similar, are never exactly alike. Natural and cultural science[1] present a definite contrast in their treatment of the material and in their aims. This contrast may be explained mainly by the introduction into the study of culture or civilisation of one all-important factor with which we do not reckon in the science of nature — the factor of the human will. The events of individual and social life are to a great extent the result of actions, and actions are guided by intentions towards definite aims. Animals are also led by intentions, but these intentions are connected with direct appetites and simple instincts, while the will of man is influenced not only by surrounding circumstances and animal impulses, but by the conscious activity of the reflective mind and of social intercourse. The products of this activity are gradually accumulating and transforming the moral and spiritual world of man.

This being so, we have to deal in the scientific study of civilization not only with causes and effects, as in natural science, but with purposes and means, and when we examine the progress of human history, we investigate not only what has happened and why it has happened, but also what has been done and what ought to have been done. In other words we

[1] See Rickert, Die Grenzen der naturwissenschaftlichen Begriffsbildung, Freiburg i B. 1896—1902. Cf. Vinogradoff, Outlines of Historical Jurisprudence, I, 73.

reflect on the relation of human conduct to human welfare and moral ideals, and we judge it by standards of value. Electrical discharges have occurred, as far as we know, since the world began, quite irrespective of the existence and of the needs of man, but when the properties of electricity were discovered by scientific observation and calculus it became possible to capture electric currents and to make them serve the needs of man for purposes of lighting, heating, traction, healing. It is to this domain of cultural science that the study of jurisprudence belongs.

It would be tempting to start on our course with some statements as to the origins of legal culture, but before attempting something of the kind we ought to familiarise ourselves to some extent with the general technique of legal thought, with the use of juridical tools. The most convenient way of conducting this preliminary examination is to look to the handicraft of our own time rather than to the obscure materials of ancient law or the strange practices of primitive or barbaric peoples, which it will take some time and some efforts to ascertain and to understand correctly. In this case as in many others it is safest to proceed from the known to the unknown. Let us survey the surface before we dig for the roots.

In the reflective study of law called jurisprudence it is usual to contrast two distinct methods of thought — the analytical and the historical. Such an opposition is, however, not altogether correct. It is suggested by a prima facie comparison between works in which legal principles and rules are treated as if they existed by themselves, in a peculiar world of

juridical concepts and deductions, and works in which attention is paid to the origins and growth of these principles and doctrines. Such a contrast exists, but it is not difficult to see that the second term does not cover all the processes of observation and generalisation which may be opposed to the analytical treatment. The logical antithesis to analytical is synthetical: the counterpart of dissection is amalgamation. And indeed we may see at work in jurisprudential thought by the side of analysis of concepts and rules various attempts to trace connecting links, forms of amalgamation and alliance. The materials for synthetic conclusions are not supplied by history alone in the narrow sense of the word. They may be obtained, for instance, by a comparison between enactments of contemporary legislation or from statistical data. Let us look at the distinguishing feature of each of these two methods of jurisprudential thought — the analytical and the synthetical one.

Lawyers and students of political science are familiar with juridical analysis as applied to particular cases. In order to establish the reason for a decision (ratio decidendi), the Court has firstly to disentangle the relevant facts from the mass of evidence produced by the parties in order to constitute the minor premise of the juridical reasoning; secondly, it has to discover the legal rule or principle which ought to be applied as a major premise to the selected facts. Take as an example Lord Herschell's judgement in the case of Derry v. Peek.[1] The promoters of a company formed to construct a local tramline

[1] (1889) 14 A. C. 337.

had stated in their circular that the company would work their trams by horsetraction or by steam; they assumed that they were practically certain to obtain the necessary licence from the local authority. As a matter of fact the licence to construct a line worked by steam was refused, and the company went bankrupt in consequence. One of the shareholders who had been induced to invest money in the concern brought an action against the promoters on the ground of deceit, and the Court of Appeal gave judgement in his favour, because it considered that the statement in the circular constituted a false representation. The House of Lords, however, reversed this decision. Lord Herschell's judgement may be cited as an example of juridical analysis; he dismissed as irrelevant comparisons with information supplied by trustees, and drew a distinction between statements made with intention to deceive and statements made carelessly, but in good faith. This served as the major premise to the conclusion, while the minor premise is supplied by the recognition that the promoters of the company, though mistaken in their assumption and not sufficiently cautious in drawing up their circular, were not guilty of deliberate misrepresentation.

The case of Rylands v. Fletcher may serve as an instance illustrating the generalisation of a special rule.[1] A coalmine belonging to Fletcher was flooded by water which had collected after heavy rain under the soil of a neighbour's estate. When Fletcher sought compensation, the defendant pleaded that he had no knowledge of the dangerous water and had not been

[1] (1866) A. C. L. R. 1 Exch. 265 and (1868) L. R. 3 H. L. 330.

negligent in managing the watercourse on his plot. There was no direct authority bearing on such a case: the House of Lords applied to it as the major premise a rule which was set up in the case of damages awarded to persons injured by animals. The owner of a dog or a horse that had inflicted an injury was held responsible for the behaviour of the animal in his custody. This ground for liability was now extended to cover inorganic objects like a source of water. The principle was generalised: Things which might prove a Source of Danger to persons or to their interests are held to be in the custody of their owners, masters or occupiers, who have to bear the risk in case of damage and are liable for compensation to the sufferers.

Any number of instances of similar operations of juridical thought may be observed in primitive and ancient law. Take as an example of the differentiation of an indistinct rule the amendment of the law as to the remission of fines effected by Birger Jarl, the Regent of Sweden in the second half of the XIII century (Östgötalag). It had been the custom to absolve a criminal from the payment of a fine incurred by him if he obtained a pardon from the offended person. Birger Jarl held that the aggrieved person could remit only the private compensation due to him, and ought not to dispose at will of the portion of the fine due to the public on account of the breach of the peace.[1]

The process of analytical thought is not essentially different as regards theoretical examination of comprehensive doctrines, although it may not be arranged so conveniently in accordance with the scheme of syllogisms as

[1] Östgötalag, Vath. 6, § 5.

when we are dealing with a trial. The aim may be either the unfolding of the various consequences and implications of a given proposition, or the generalisation of special principles and rules. In all such instances there would be room for the application of dialectical reasoning. The decision of Lord Mansfield in Harrison v. Evans[1] presents a remarkable example of prospective insight guided by the analysis of the necessary consequences of a principle. It arose out of the application of the general principle of Toleration recognized in 1689 to the specific claims of Dissenters. He said: „Dissenters within the description of the Toleration Act, are restored to legal consideration and capacity; and one hundred consequences will from thence follow which are not mentioned in the Act. For instance, previous to the Act, it was unlawful to devise any legacy for the support of dissenting congregations or for the benefit of dissenting ministers . . . . . and such a devise was absolutely void, being left to what the law called superstitious purposes. But will it be said in any Court in England that such a devise is not a good and valid one now? And yet there is nothing said of this in the Toleration Act."

There are certain dangers connected with the use of the analytical method in jurisprudence. Abstract notions and terms are often treated by analytical jurists as if questions of terms and formal classes constituted the substance of jurisprudence, and could be used without reference to social realities. In this way a „world of concepts" is formed in which abstrac-

[1] 3 Bro. Parl. Cas. 465 (1767).

England, offers an example in point. It is a heterogeneous formation, in which the principles of association and of corporation are mixed up in a way which can only be explained by historical circumstances and political aims. The Trade Disputes Act of 1906 conferred on the unions an immunity from prosecution on the ground of tortious acts of their agents; this immunity stands in flagrant disagreement with the law of agency and the law as to companies represented by their officers in accordance with the Statutory Orders of 1883. The reason for this discordant state of the law is to be found in the resolve of the legislature to secure for the unions a favourable position in their economic struggles with the employers. Obviously legal analysis has to be supplemented on such points by a study of the political and historical reasons for the conflict of leading ideas. [1]

This last consideration has to be extended further. The analytical method proves to be of invaluable assistance in comparative research in law, by calling attention to the similarities and differences in the solution of the same problems by various systems of law. By setting side by side such doctrines as that of Cause and consideration we are enabled to notice much more clearly the peculiar nature of contractual obligation than if we were to examine the English or the Roman or the French doctrine each by itself. The same may be observed in the treatment of the rules as to parental authority, marriage, and the like. It is obvious, however, that compari-

[1] Cf. Vinogradoff, Aims and Methods of Jurisprudence in the Columbia Law Review, 1924, vol. XXIV, p. 4 f.

son cannot stop at this point. The fact that the solution of the problem is sought on divergent lines by the English and by the French calls for an explanation which can hardly avoid taking into account various conditions imposed by the milieu where the solution is attempted. This opens the way to considerations of a synthetic nature.

II.

When we speak of analysis, of analytical method, we employ terms of logic pointing to dialectical operations of the mind on concepts — the splitting of generic notions into species, the ranging of concrete facts in one or the other subdivision, the delimitation between the species, the attribution of characteristic predicates to given genera or species, and conversely the abstraction of general concepts from special groups and particular facts. All these proceedings are necessary for connected reasoning, and are directed towards the coordination of ideas and freedom from contradiction in thought. But the orderly distribution of materials, as it were, in boxes and drawers, the smooth opening and shutting of these drawers, is not sufficient in itself to explain the existence, growth or decay of the things deposited in them. In the life of human beings these material contents are supplied by processes in which amalgamation of elements essentially different from each other and not to be deduced one from the other plays a decisive role.

We have to consider human society from the point of view of the feelings of affection and repul-

sion, of friendship and hostility, of hope and fear which weld men into groups, apart from the influence of correct reasoning. We all know to what extent our conduct and character are affected by irrational cravings, by attractions and repulsions, by habits and instincts, by the unconscious and subsconcious elements of our nature. As far as individuals are concerned we have to turn for explanation to biology and psychology. The counterpart of biology and psychology in the study of social life is politics and synthetic jurisprudence. Life consists in the amalgamation of heterogeneous elements into organic units.

It may be observed that the products of such amalgamations do not necessarily continue the tradition of one or the other of the heterogeneous elements which enter into their composition; but, on the contrary, appear with peculiar characteristics of their own. Water does not present the same attributes as hydrogen or oxygen; the fruits of an appletree differ in aspect and taste from the soil that has given them nourishment. In the same way the rules of conduct of a given society are usually the result of converging ideas of various kinds of which every single one would be powerless to produce the effect required.

Neither the life of the family nor that of the professional guild, nor that of a church, nor that of a nation, nor that of a State depends entirely or mainly on the faultless regularity of its logical construction. To take a familiar example, it is not the contract of marriage that ensures the happiness and mutual devotion of a married couple. Marriage is a complex experience and an institution to which many heteroge-

neous elements contribute: it may be analysed in regard to these various component factors — sexual attraction, moral sentiment, care for children, practical utility, economic solidarity, traditional habits, conventional habits, sacramental beliefs, and each of these factors may be subjected to separate observations and deductions. But if we want to study it as a living whole we are bound to speculate on the binding force, on the synthesis which brings and holds together the various elements in average cases, or discloses dangerous centrifugal tendencies. This is a problem for synthetic sociology and synthetic jurisprudence.

There are special reasons why the synthetic method in the investigation of social facts appears to be particularly acceptable to English-speaking people. Ever since the days of Bacon English thought has been characterised by distrust of generalisations obtained by pure dialectics and not supported by actual observation or experiment. The war against Scholasticism waged by Bacon has been continued in various fields, conspicuously so in psychology, both individual and social. In opposition to the logical interdependence of ideas their association by habitual contact has been insisted upon in English and Scottish psychology, e. g. by the school of Bain. Not only for animals but for men ideas of food and of foodgiving parents or masters get associated and produce emotions and affections. Similar associations are created by punishment, by danger and the like. These psychological facts prepare the ground for a treatment of social phenomena on synthetic lines.

The means for estimating synthetic forces may be

supplied by practical wisdom or by artistic intuition or by observation and systematic reflection. An example of such synthetic estimates may be seen in the entrusting of the verdict of facts to juries of laymen, notoriously deficient in the power of strict analysis, and yet called upon to sum up the impressions of protracted and puzzling trials. Too often this mode of winding up a case is nothing more than a cut through a Gordian knot of uncertain and entangled evidence. Yet the experts in juridical analysis — the judges — stand aside and leave the responsibility for concentrating the imponderabilia of impressions and synthetic judgements to laymen, whose principal qualifications for the task consist in practical experience and in sensitiveness to public opinion. Even in cases where the judge acts alone he has often to have recourse to estimates of a synthetic nature. Wherever equitable standards have to be applied the judgement is bound to assume a synthetic character, because equity is essentially a fitting of legal rules to circumstances, to complications not allowed for by general rules.

As regards the frequent cases in which Courts have to form estimates in connection with standards of reasonableness I may cite as examples — the bonus paterfamilias of the Romans,[1] reasonable custom in English law,[2] reasonable competition and combinations in trade, the application of Sherman's Law against the trusts[3] in America, etc. The German and the Swiss Codes call upon the judge in as many

[1] Buckland, Textbook of Roman Law, 551.

[2] C. K. Allen, in Law Quarterly Review, 1923.

[3] Lambert, Le Gouvernement des juges, 150 ff.

words to consider in his decisions „good faith and trust" (Treu und Glauben) as well as business practice (Verkehrssitte).

It is obvious that the various forms of legal organization are bound to depend on the properties of things to be organized and on the character of the organizers. This being so, we shall have to look for the ties, the connecting links of jurisprudence, in the various domains of human activity which are not law, but are reflected in law. Synthetic principles are provided by heredity and racial mixture, by magic and religion, by economics, by political arrangements, by social intercourse, by ethics. In other words while law in its own field may work by dialectical analysis, it receives its synthetic impulses from the contents supplied to it by various human activities which are organized and coordinated by it.

The theory built up by Taine in order to explain the psychological unity of individuals by the predominance of a faculté maitresse may serve to illustrate this kind of approach in jurisprudence and social science. It consists in discovering the leading idea — the idée maitresse — which arises in given surroundings — the milieu — in response to the requirements of a situation. Such ideas may sometimes be discovered by artistic insight. The intuition of Fustel de Coulanges in discerning the worship of ancestors as a leading idea of the ancient Commonwealth, or of Mommsen in laying stress on the conception of imperium as the root of Roman public law, carries conviction by stimulating the imagination of their readers to move on similar lines.

But, apart from the power of personal suggestion, certain scientific precautions may be used in treating the problem. It is evident, to begin with, that the materials to be used are mainly to be derived from history, because history in the wide sense of the word is the experience of mankind as preserved by memory, and in this sense it stretches from the earliest times to yesterday.

Secondly, a convenient way of approach is presented by comparative study, because if we have to discover secrets which cannot be revealed by logical analysis, the best we can do in order to eliminate casual influences and secondary complications is to concentrate attention on recurring manifestations of certain combinations by confronting cases of actual historical experience with similar cases in other surroundings. This expedient has been employed over and over again by writers such as Maine, Dareste, Post. It has been proclaimed as the chief object of research by literary organizations like the Zeitschrift für vergleichende Rechtswissenschaft.

The principal methodical consideration to be taken into account by comparative workers is the necessity of starting from some common basis obtained by direct observation. This is obvious, and yet there have been numerous instances when juridical comparisons have been instituted whithout much care for ascertaining the common ground or the connecting link. Post's and Bastian's works on ethnological jurisprudence have been greatly vitiated by the use of haphazard analogies: their generalizations as to marriage customs or as to the origins of property remind one

of beads loosely strung together by a flimsy string which is apt to break at the slightest impact of realistic criticism. It is against such accumulation of analogies that Maitland's criticisms[1] were directed.

In order to avoid this reproach a basis for comparative study may be sought in common descent.[2] It is superfluous to insist on the use of this feature in comparative philology, comparative religion and folklore. Comparative jurisprudence has also had recourse to it — I may just name Ihering's volume on Indo-European legal origins and Leist's works on Aryan jus gentium and Aryan jus civile. The results of these synthetic surveys have not been very successful: Leist has built up without critical precautions detailed systems of Aryan law from materials which, on careful examination, prove to be much more characteristic of the differentiation of national concepts than of their Aryan unity. Nevertheless the conduct of comparative investigations on lines of common descent must be regarded as a very useful expedient and may be recognized as the background of all attempts to describe Aryan or Semitic origins. The best work in this direction has been achieved by relying to a great extent on the results of the comparative study of languages.[3] There may be cases where anthropological research proceeds in the opposite direction —

[1] E. g. History of English Law (1 ed.) II, 237; Domesday and Beyond, 345.

[2] Cf. Vinogradoff, Comparative Jurisprudence in Encyclopaedia Britannica, 11 ed., vol. XV, p. 580 ff.

[3] Schrader, Urgeschichte und Sprachvergleichung, and Reallexikon der Indogermanischen Altertumskunde.

when the stress of the argument consists in the fact that the same specific arrangement occurs in widely different surroundings and must be derived therefore from the recurrence of some common idea.

Take the custom of the couvade — the simulated confinement of the husband of a woman who is about to give birth to a child. It seems an odd practice for a strong male to pretend that he feels the travail of childbirth and to submit to the nursing of compassionate females around him. Yet this comedy is being enacted with similar ceremonies among the natives of the Malay Archipelago, the Caraibs of Central America and the Basques of the Pyrenees. Students of primitive folklore look upon it as a manifestation of sympathetic magic.[1] By subjecting himself to a selfimposed struggle with illness an outsider, generally a medicine-man, a shaman, a sorcerer, assists the sufferer and helps him to overcome the pain and the efforts in the struggle.

We should perhaps recognize here a power of suggestion like that practised nowadays by Christian Scientists. From the point of view of the student of law it is characteristic that it is the husband of the woman child-bearing who performs the sympathetic cure. This fact brings the couvade into connection with another set of observations — namely with practices directed towards establishing a paternal relation between a supposed father and his child.[2] It is obvious that such comparisons and explanations are only

[1] Frazer, Totemism. IV. 246 f.

[2] E. B. Tyler in Journal of the Archaeological Institute XVIII, 254 ff.

admissible when the similarity between the practices under observation is very great and extends to details. Vague analogies will not do.

Another avenue to be explored with a view to juridical synthesis is opened by the classification of legal systems according to types. It is obvious that the laws of a democracy and of an oligarchy are bound to differ in harmony with the peculiar traits of the political type. Thucydides, Aristotle, Montesquieu, de Tocqueville, Bryce have left us guiding observations in these respects. Another basis for classification by types is afforded by economic evolution. It has been regarded by economic materialists as the leading principle of human history. For Marx, Engels, Kautsky, Loria, Labriola the organization of production is the moving force on which all other forms of development depend, and law is conceived as one of the superstructures on the economic foundation. But one need not adopt this monistic scheme in order to recognize that economic stages certainly mark new departures in the formulation of juridical rules and the growth of legal institutions: hunters and fishers transact their affairs on different lines from pastoral nomads, and the juridical conceptions of the latter differ from those of agriculturists, industrialists and commercialists.[1] Within these classes we have to reckon with many varieties, for instance, in industrial societies, with the customary organization of local crafts and with industrial production on a national and on an international scale. K. Bücher and Max Weber have done a great

[1] See Vinogradoff, Outlines of Historical Jurisprudence, I, 157 ff.

deal to elucidate the problems arising from the study of economic types of this kind.

Lastly, synthetic comparisons may start from a classification according to types of social organization, a device which I have adopted in my „Outlines of Historical Jurisprudence". The contrasts in the treatment of juridical problems by totemistic tribes, matriarchal and patriarchal communities, city commonwealths, feudal organizations, theocracies, individualistic societies and socialistic societies are marked and fundamental. They present convenient starting points for the purpose of coordinating laws and institutions.

The final results will depend on cross currents, transitions and compromises between heterogeneous factors. The action of a powerful tradition like that of Roman law, for instance, has modified considerably the effects produced by feudal disintegrations and theocratic ideals. Again, the influx of socialistic ideas may be stemmed to a great extent by the existence of opportunities for individualistic enterprise. Peculiar compromises will be the outcome of the conflict. But if we keep in sight the typical varieties of economic, political, social organizations it will help us in finding our way among the products of cultural evolution.

CHAPTER TWO

CUSTOM AND LAW

We are accustomed nowadays to the enactment of laws by the State; and we regard legislation — the deliberate elaboration of legal rules — as one of the principal functions of the State. It does not, however, require much learning in order to perceive that such conscious and direct legislation is of comparatively recent growth; it is the attribute of a definitely organized State, the result of a fairly advanced political civilization. In rudimentary unions, in so-called barbaric tribes, even in feudal societies, rules of conduct are usually established not by direct and general commands, but by the gradual consolidation of opinions and habits. The historical development of law starts with custom. Rules are not imposed from above by legislative authorities but rise from below, from the society which comes to recognize them. The best opportunities for observing the formation and application of custom are presented when primitive societies are living their life before the eyes and under the control of more advanced nations, as, e. g., in

British India, or among the tribes of the Indonesian Archipelago ruled by the Dutch. Some of the heterogeneous population of the Roman Empire were in a similar condition, and the same may be said of most of the peoples of Mediaeval Europe confronted by the Universal Church which had inherited the remnants of antique civilization. This latter case, that of the European barbarians, is especially interesting for us because it reflects the origins of legal institutions of our own society.

The Jurisconsults of Imperial Rome, bent on formulating a coherent doctrine of legal obligation, derived customary rules (consuetudines) from the same source as laws (leges), namely from the will of the people; Salvius Julianus taught that in the case of law such will was said to be manifested by express consent to an enactment, while custom was established by tacit consent as implied by the facts of actual usage.[1] We need not attach too much importance to the theoretical assumption that the will of the people is the ultimate source of law in all its forms. What is really significant is the stress laid on

[1] D. I. 3. 1. 32. Julianus libro LXXXIIII digestorum De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet. Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum, nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? quare rectissime etiam illud receptum est, ut leges non solum suffragio legis latoris sed etiam tacito consensu omnium per desuetudinem abrogentur.

habits (mores) as the psychological explanation of customary law. The reference to mores is a recurrent one in the language of Roman writers, Varro, Cicero, Quintilian. We come across it even in technical terms: we hear of a deductio quae moribus fit in the case of formal eviction conducted by agreement between the parties in a dispute as to land.[1] The main points are the unofficial formation of such a rule of conduct, its recurrent manifestation by concrete facts, and its explanation by a moral submission of the mind. The doctrine was meant, evidently, to apply to Roman citizens in general, but it was particularly adapted to the juridical life of the autonomous communities included in the Empire: its practical signifiance was felt chiefly in the acceptance by Roman authorities of peculiar rules of local origin. Mitteis' great work on Reichsrecht und Volksrecht contains ample materials for the study of this form of juridical life in the Eastern provinces of the Empire. The practice of the tribunals which had to apply the law had obviously great importance in the recognition of custom, and a saying of Ulpian calls attention to the part played by judicial decisions in disputed cases for the continuance of custom.[2] If it is admitted that custom stands by the side of enacted law, the question arises as to the relative value of the two sources. A rescript of Constantine addressed to a

[1] Cicero, Pro Caecina, 7, 11.

[2] Dig. I. 3, 1, 34. (Ulpianus) libro IIII de officio proconsulis. Cum de consuetudine civitatis vel provinciae confidere quis videtur, primum quidem illud explorandum arbitror, an etiam contradicto aliquando judicio consuetudo firmata sit.

Governor of Africa lays down the requirement that custom should not be in contradiction with law or with reason.[1] The superiority of law over custom was insisted upon in order to enable the representatives of Imperial unity in the province to overrule, if necessary, popular customs. This does not militate against the acceptance of provincial or local divergences of a kind which did not move the central authority to assert its superior power.

As for reasonableness, the notion is a wide one and could be used for different purposes by those who controlled the administration of justice in the provinces. The ratio — the leading idea of a particular institution, — lease or sale, for example, — may be meant; or the general principles prevailing in Roman law — e. g. the decisive rôle assigned to free consent in transactions; or the reasonableness of plain common sense as against eccentric or unfair solutions. The glossators used to cite as an example of the latter variety the rule obtaining in Bologna,[2] according to which a carrier was not responsible for any mishap that might have befallen a cask of wine or a bale of goods consigned to his care, if the owner of the merchandise touched the load with his hand. This customary rule must have been suggested by the wish to draw a clear line between the liabilities of the owner and of the carrier by forbidding the former even to

[1] VIII. 52, 2. Imp. Constantinus A ad Proculum. Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem. D. VIII k. Mai. Constantino A. V et Licinio C. conss. (a. 319).

[2] Azo, Summa in Cod. ad. VIII. 52, 2.

lay a finger on the load once the carrier had taken charge of it. Yet by some commentators the rule was deemed preposterous and unreasonable.

The test of unreasonableness could only be made effective by the intervention of superior authority, and it is evidently in view of such intervention by way of judicial decision that Constantine had mentioned it in his rescript to a provincial governor. In an earlier case Septimus Severus and Caracalla permitted the inhabitants of a town on the Dniestr (Akerman) to let a bad custom stand in respect of former applications of it, but not to allow any recurrence of it in the future.[1]

Similar problems presented themselves to the hierarchy of Western Christendom in the period when a compact body of Canon Law grew up as a result of the action of Councils and Popes. What position was to be assigned to the national and regional customs obtaining in the various countries in distinction from the legal rules decreed by legitimate authority for the Catholic Church? A considerable latitude was conceded to old-established customs of ecclesiastical institutions — bishoprics, chapters, monasteries, — and also to special views of the laity as to limits of secular and ecclesiastical jurisdictions, in cases of investitures, intestate succession, marriage, legitimacy, etc. At the same time the supreme authority of the Roman curia had to be maintained in fundamental questions. The history of the relations between temporal and spiritual power is full of incidents arising from these conflicting tendencies, and it is not my object to review these

[1] Epistola Severi et Caracallae ad Tyranos (Bruns, Fontes juris Romani, ed. VI. p. 246.)

dramatic struggles. I must, however, call attention to one or two characteristic facts drawn from the literary developments which accompanied such disputes in practice. It is hardly accidental that the first great codifier of Canon Law, Gratian, writing at a critical moment in the history of the struggle of the Papacy for power, went back to the doctrine laid down in Constantine's rescript, and, while assigning considerable importance to ancient custom, laid stress on the superiority of law as stated and confirmed by Papal authority. It is also well worthy of notice that in the XIII century, which may be called the century of the triumphant ascendancy of the Church, the Popes relaxed, as it were, the strict discipline of juridical unity and allowed a wider margin to customs, primarily, of course, provincial and local customs. One of the Decretals of Gregory IX proclaims the validity of custom even when derogatory of the law, when the former is established by ancient practice and is not contrary to reason.[1] Boniface VIII's Decretal „in Sexto"[2] is particularly explicit; it refers pointedly to the fact that although the Pope bears all the general precepts of law scrinio pectoris sui,[3] he is not necessarily

[1] Brie, Gewohnheitsrecht, 64.

[2] Cap. IIX de consuetudine.

[3] In Sexto, Tit. II. c. 1: Licet Romanus Pontifex, qui jura omnia in scrinio pectoris sui censetur habere, constitutionem condendo posteriorem, priorem, quamvis de ipsa mentionem non faciat, revocare noscatur: quia tamen locorum specialium et personarum singularium consuetudines et statuta, quum sint facti et in facto consistant, potest probabiliter ignorare: ipsis, dum tamen sint rationabilia, per constitutionem a se noviter editam, nisi expresse caveatur, in ipsa non intelligitur in aliquo derogare. Cf. Brie, op. cit. 92.

cognizant of local pecularities and must be supposed to have conceded all customs which he has not expressly forbidden. It is evident that the wisdom of the Roman Curia prevented it from embarking on a dangerous campaign against provincial pecularities, as this would have brought it into unnecessary and unprofitable conflicts with national and local traditions. The Decretals of Gregory IX were contemporary with the famous revolts of the English magnates against the introduction of the Canon Law rule as to legitimation by subsequent marriage.[1]

Although this problem of the relation between law and custom occupies most space and attracts most attention in the writings of the Canonists and Legists, the positive conditions which call customary rules into existence are also beginning to be defined and discussed. The conception is gaining ground that the binding force of custom has to be derived from popular conviction that certain matters, — say succession or contract, — should be treated in a certain way. This is the root of the requirement as to opinio necessitatis.[2] The submission to the customary rule in a concrete case, for example as to the equal partition of chattels among the children of the deceased, or the attribution of some particular goods, e. g. trinkets, to certain persons, such as daughters, is the result of the previous opinion of the persons concerned, as members of a group, that this is equitable and right. If such a common opinion does not exist, there can be no valid customary rule.

[1] Cf. Pollock and Maitland, History of English Law, II. 376 (1st ed.).

[2] Brie, Gewohnheitsrecht, 173 ff.

The requirements of long usage and of reasonableness were maintained and further developed by Canonists. The former were not understood in the sense of practices established at a time of which memory does not run, but rather treated in connection with rules of prescription: the terms of ten and twenty years[1] are often referred to. More interesting is the interpretation given to the requirement of reasonableness. The prevailing idea was suggested by the teaching on the law of nature, as formulated e. g. by Thomas Aquinas. This law has its roots in reason, and is implanted by God in human beings to serve as guidance in their conduct. It is the highest manifestation of law in the world apart from rules directly revealed in Scripture; it serves even to distinguish among the latter, between universal commandments and ceremonial precepts or decrees fitted to the special needs of the Hebrew people.[2] In the hands of the professional Canonists this leading idea is worked out in the sense that customs should be deemed unreasonable if they are in contradiction with general rules derived from the law of nature[3] and from equity[4] or if they promote vice and thereby endanger salvation. It is not easy to see what else could have been meant by the contrast between custom and general law.

When the creation of custom is ascribed to con-

[1] Brie, Gewohnheitsrechts 89 f.

[2] Summa Theologica, II. 1. Qu. XCI. Glossa ord. Rationabilis ad. cap. II—X.

[3] Innocent IV, ad cap. 11—X. h. t. (rationabilis).

[4] Hostiensis, Summa ad h. t., num. 3 (Brie, 133). Lectura, ad cap. 9 X h. t. (Brie, 134).

viction or opinion, the question as to the nature and limits of the group in which such an opinion is prevalent arises as a matter of course. It is not the views of separate individuals or chance crowds that can be accepted as decisive in settling a rule which is to be recognized and followed by all.[1] If there is to be common conviction and common actions what is the community by which the rule is established? The Canonists reckon with various communities of this kind — with colleges and chapters, with cities, provinces, nations, the catholic body of the Church. As Gierke has shown, Canonist doctrine regarded all corporate bodies as institutions „arranged" for the purpose of carrying out various tasks of secular or spiritual intercourse. As such they had no real existence apart from the State or the Church that had called them into being or accepted them when contrived by individuals.[2]

The range of observation was greatly enlarged by the entrance on the scene of the autonomous groups of barbaric and feudal communities — kingdoms, manors, boroughs, townships, counties, tribes, etc. These political and social bodies were obliged to take up the examination of concrete problems of customary law from that very side of opinion or conviction which remained so obscure in canonistic literature. The writers who attempted to treat systematically of customary law — Beaumanoir, Eike von Repgow, Bracton — were not a match for the glossators and canonists in respect of theoretical deductions, but they ar-

[1] Gierke, Genossenschaftsrecht, III. 215, 382.
[2] Ibid. 248 ff.

ranged and explained the positive rules in a way which makes it possible for us to discover several leading ideas in their exposition, and the abundant materials gathered in custumals, pleadings and decisions corroborate and extend these conclusions.

Investigations were conducted as to the existence and exact bearing of customary rules. The powerful centralization produced in England by the Norman conquest led to the formation of a common doctrine of the Royal courts which . came to be accepted as „common law" and was derived from judicial decisions used as precedents. This doctrine represents the juridical influence of the military class[1] and has been a powerful factor in modifying in all directions the older traditions. Even in England, however, peculiar customs were recognized in certain localities and had often to be ascertained by the courts. The most extensive concession of this kind was made to Kent, where the ancient usages connected with gavelkind tenure were recorded towards the end of the XIII century, according to tradition, at an eyre of Sir John Berwick in 1293.[2] Local usages of towns, manors and even families were often admitted as regards succession, services and rents, and in such cases their contents and duration were ascertained by inquests of juries called for the purpose.[3] In this way some traces of more ancient custom of Anglo-Saxon, Danish or Norse origin were preserved in the rules governing

[1] Cf. G. B. Adams, The Origin of Common Law, Yale Law Journal, 1924.

[2] History of English Law, I, 165, 415.

[3] E. g. Notebook of Bracton, pleas 11, 233, 278, 589, 779.

the status of socagers and sokemen.[1] But the principal storehouse of customary law distinct from common law is to be found in manorial practice.[2]

In France, owing to the disruption of the country into a number of autonomous and almost independent regions, law took a different course. In the central region around Paris, in Normandy, Brittany, Picardy, Anjou, Poitou, Maine, Touraine, Languedoc, Guyenne, Burgundy, etc. special customs arose;[3] in each region the customs of the military class are not so overwhelmingly predominant as in England. As a result the traditions of the free, rent-paying classes of the roturiers, preserve a much greater vitality and sometimes come to influence the arrangements of the military class.[4] They are ascertained in many cases by verdicts of inquests similar to the English juries, though not formed with the same regularity. The enquête par turbe gave evidence as one body; it was usually composed of advocates, merchants, substantial farmers, or house-owners called up by office or by the parish as experts in customary law. The ultimate decision, as in England, rested with the judges. The action of the judicial element in settling customary rules is well exemplified by a book like that of Beaumanoir, who treats of the custom of Beauvaisis from

[1] Custumal of the Soke of Rothley, ed. Clark, Archaeologia, XLVII.

[2] Select Pleas of Manorial Courts (Selden Society).

[3] Even the South of France is not free from customary traditions. See Caillemer, in Essays in Legal History ed. by P. Vinogradoff.

[4] Olivier Martin, Coutume de Paris, I. 122 ff.

the point of view of his experience as a judge in the baillage of Clermont.

The popular character of customary law is more marked in Germany.[1] The country was divided into a great number of more or less autonomous political formations — not only provinces, tribal regions (Stämme) and territorial principalities of varying size, but into military groups under feudal law (Lehnrechte), serjeanties under special service customs (Dienstrechte), rural districts under peasant customs (Bauernrechte), towns under borough customs (Stadtrechte), etc. All these varieties developed customary rules of their own, and the task of ascertaining their contents was one of the most important features of German juridical life. This was effected in two different ways — by appointing as assessors in the Courts men well cognizant of the convictions and usages of the various circles: these were the Schöffen (scabini)[2] the denomination being attributed more especially to the representatives of the free men who did not lay claim to nobility of birth (schöffenbar freie). It was to them that people looked for the declaration of the law of the land (Landrecht); lesser freemen, e. g. the Bargilden and even Landsassen of Saxony were also governed in most of their relations by „Landlaw".[3]

The second method consisted in obtaining pronouncements on matters of customary law from specially appointed inquests. The persons called upon to

[1] Amira, Grundriss des germanischen Rechts, 32.

[2] Schröder, Deutsche Rechtsgeschichte, 163 ff

[3] Sachsensp. I, 2, § 4; III, 45, § 6. Cf. Brunner, Grundzüge der deutschen Rechtsgeschichte, 91, Schröder op. c 435 ff.

make such pronouncements might be the same as the Schöffen employed in administering justice, but there were also occasions when questions were addressed to a wider circle of experts. In any case a pronouncement of this kind (Weisthum)[1] was regarded as embodying a verdict based on the sense of right of the community. The collections of German and Danish Weisthümer present invaluable materials for the history of legal and economic arrangements in rural Germany.

The situation in the Scandinavian countries is even more interesting. Thanks to the incomplete sway of feudalism and to the compact native population, not intermixed to the same extent with the Romanesque elements as was the case in the South and in the West, Swedish, Norwegian,[2] and to a lesser extent Danish law has remained for a long time based on this ancient customary tradition. If we take the Swedish provincial laws as an example we find that they go back professedly to oral popular tradition preserved in the centuries immediately preceding their fixation in writing by means of a regular system of declarations made by elected experts — laghmen — in the presence and with the approval of popular assemblies. The Westgötalag, the Östgötalag, and the Uplandslag have preserved the memory of leading „speakers" of this kind — Lumber, Aikill, Vigers, and they refer to a continuous tradition of pronouncement from the IX to the XIII century. Such a system is undoubtedly

[1] Grimm, Rechtsalterthümer, 4te Aufl. II, 386 ff.

[2] I do not mention Icelandic law, because it is very peculiar as being that of a newly and sparsely colonized country, see, however, Konrad Maurer, Island (1874).

the result of the preponderance in a differentiated society of leading landowners exercising a great deal of authority in all political, economic, and legal affairs. The laghman appears as a professional expert and cannot be described as a representative of ancient democracy. Nevertheless his pronouncements were regarded not as products of his superior intellect and skill, but as revelations of national lore. The institution of the „lawspeaker" must undoubtedly be regarded as a striking instance of a process of law growth which derived its authority not from an outside sovereignty imposed on the people, but from the concentration of popular ideas and practices into definite pronouncements by spokesmen entitled to voice the convictions of the people. [1]

Let us examine some of the substantive features of this law conditioned by the peculiarities of its formation. A comparative survey of Western European customs discloses, as it seems to me, three main factors: business practice, tradition, and reflective formulation. In speaking of business practice I have in view the various usages arising from non-litigious intercourse between members of a community. It is evident that customs regulating marriage, succession, the discipline of children, the status of women in the family, the management of fields, woods, pastures, etc. grew up not as cunning devices, but as convenient arrangements between people brought together by circumstances. Before being enforced as legal rules such arrangements passed through the stage of usage and habit. Sometimes we catch a glimpse of the actual

[1] Cf. Amira, Grundriss, 79 ff.

transition from one stage to the other. The composition for a murdered relative was originally offered and accepted as a varying peace compromise, depending on the forces in conflict, the actual risks, the state of mind of the parties. Eventually definite tariffs are worked out requiring definite amounts to be claimed by various relations in accordance with the social status of the slain.

The right of the youngest son to inherit his father's homestead grew out of the practice of letting elder brothers set up on their own account before the death of the father with such outfit as they could get according to the means of the family and to the accepted notions of the country-side.

Social habits and conventions acted as intermediate links between arrangements of a more or less fluctuating nature and customs crystallized as legal rules. Mediaeval commercial law was commonly declared and applied by juries of experts composed partly of foreigners — Germans, Flemings. This process has been going on in modern times and may be noticed to some extent even now. The Law Merchant was until the second half of the XVIII century a body of customs developed in business intercourse apart from Common Law. In our days the Stock Exchange is regulated by practices formed within the circle of its members in transacting business. [1]

[1] The late Professor Eugen Ehrlich has given a great deal of attention to this side of the problem in his Grundlegung einer soziologischen Jurisprudenz. His conclusions seem exaggerated, especially as regards present day conditions, but the argument is presented in an interesting manner and is worthy of serious consideration.

Let us turn back to the epoch when the customary law was not an exception, but the principal form of juridical life. The sources insist again and again on the necessity of long duration, of „inveterate" habit, but this requirement must not be taken too strictly; many customary rules did not appeal for their recognition to more than a continous usage during some twenty or forty years. But these are barriers drawn for the sake of evidence in courts. In reality many customs have continued for centuries in a world little disturbed by brisk intercourse and widespread commerce. In fact, one of the most curious features of the situation consists in the survival of rules and habits whose roots are embedded in unfathomable antiquity and which emerge sometimes from the depth of popular life after having disappeared for long years from the surface of legal administration. Julius Ficker has made a laborious study of such traditional currents in Germanic custom. His attempts at tracing the paths by which inheritance and kinship have become differentiated among the Germanic tribes cannot be said to have achieved uniform success: they suffer from a pedantic striving to assign a definite place to every detail in accordance with a favourite theory that similarities in treatment are to be explained as ramifications of a common stock. Obvious considerations as to the influence of other ethnological factors than the Germanic race are brushed aside after a few casual remarks;[1] ancient records are not studied with the necessary critical attention. Yet Ficker's point of view has enabled him to throw light on some important

[1] Cf. Outlines of Historical Jurisprudence, I. 370 ff.

facts. His best suggestions concern the value of late Spanish and Portuguese customary records (Fueros) for the reconstruction of legal customs carried over by the Goths on their wanderings from the shores of the Baltic into the Pyrenean peninsula. The blood feud had been officially abolished in the Lex Wisigothorum, and capital punishment for murder had been introduced; yet the feud reappears in full vigour in the Fueros on the old lines of revenge and composition. An ancient arrangement of Kinship is revealed by the terminology of collateral relationship based on counting brotherhoods of cousins who appear in the side lines as first brothers (Hermanos primos or simply primos, Hermanos secondos, Hermanos tercios) and similar numbers are assigned to the uncles on both sides (Tio primo, Tio secondo). In connection with this nomenclature duties and rights are assigned to collaterals along the line of contemporary generations, not of common descent. It would seem as if at a certain stage kindreds were arranged around the kernel of the family household in concentric circles of contemporaries with duties as to mutual support and defence, and corresponding claims to part of the inheritance. So far as the Spanish example is concerned Ficker's deductions[1] are based on good evidence and are very instructive. But are we to infer with him that a similar numbering of brotherhoods in Iceland must be explained by descent from a common stock and not by the working of the same principle of alliances between contemporaries? This ranging of kinsmen by

[1] Ficker, Erbenfolge, I, §§ 238 ff.

generations finds many illustrations in the life of primitive tribes — Malays, American Indians, etc.[1]

A counterpoise to this conservatism of ancient law is presented by the necessity of adaptation to varying circumstances and surroundings. It is sufficient to compare, for instance, the consecutive versions of a regional law, in order to perceive the gradual changes in the juridical treatment of social problems.[2] These changes are undoubtedly achieved to a great extent by the working of the factor of business intercourse already noticed. But the most important share belongs in this respect to the reflective thought of the judges who had to decide disputed points in the course of actual trial. Very characteristic instances of such a revision and modification of customary rules may be gathered from the records of Swedish law or in early common law in England. As Maitland has shown,[3] that law was undergoing a radical transformation towards 1200 A. D., since the judicial reforms of Henry II. All the topics of family law, for example, the property rights of the wife, curtesy of England, free bench, wardship, etc. are being subjected to revision from the point of view of Norman feudalism and on many occasions contradictions and fluctuations are to be observed in the views of judges reflected in Glanville's and Bracton's accounts. The fact that in England we have before us a body of juridical custom rising to the dignity of common law marks a difference in degree and not in kind. The jurisdiction of the Chate-

[1] Schurz, Altersklassen und Männerbünde, 260 ff.

[2] Olivier Martin, Coutume de Paris 37 ff.

[3] Pollock & Maitland, History of English Law, 1,163.

let and of Parliament in Paris modified the Coutume de Paris in the same way as the jurisdiction of the Bench in Westminster, of the King's Council, and of Parliament shaped the feudal and socage customs of England.

The growth of customary law is certainly analogous to the social processes which originate language and folklore. Each particular statement may have been the result of some personal initiative or effort, but the aggregate appears as a product of the life of the people; tradition and imitation play a not less important part in it than actual invention.

CHAPTER THREE

FAMILY ORGANIZATION

Let us consider somewhat closely the most natural and intimate of social organizations — the family. For the sake of clearness it will be advisable to concentrate our attention on the customary arrangements which prevailed in Western Europe, but the legal data of Scandinavian countries ought to be taken into account, not only because I am speaking to a Northern audience, but also because these data throw a good deal of light on many obscure problems of British, French, and German history. I may point especially to the comparative immunity of Scandinavian developments from the material effects of the dissolution of the Roman Empire. Of course many ideas created by ancient civilization penetrated into the culture of the Scandinavian peoples through the medium of the Church, and general contact with Western culture; nevertheless, the Swedes, the Norwegians, the Danes did not have to build up their commonwealths on a soil covered with the ruins of Roman villas, of Roman industrial and commercial concerns, and inhabited

by a population grouped in accordance with social conditions of the later Empire.

We must begin our survey by asking whether there are any definite traces in the history of the family organization of Western Europe of a system in which the mother occupies the central position in the household and therefore relationship is traced through women. Such matriarchal or rather matrilineal arrangements of society are by no means uncommon among primitive tribes: they correspond to a mode of life in which the strong males are concerned with hunting, fishing, predatory expeditions, while the care of the dwelling, the raising of occasional crops, the bringing up of children are consigned to the weaker sex. North American Indians, e. g. the Iroquois, the Sioux, present conspicuous survivals of such organization even in recent times, and so does the military caste of the Malabar coast of India, the Najars. In this kind of tribal life the husband is an adventitious person in the household and his role as the father has often to be established and manifested artificially by way of some ceremony.[1]

It is likely that at some prehistoric stage our ancestors may have practised similar customs, but at the time when they entered into the light of history their institutions were undoubtedly constructed on a different pattern — the patriarchal one. Before describing its pecularities I should like, however, to mention one

[1] Cf. Frazer, Totemism, pp. 141 ff. In a trial of Edward I's time, Ralph of Hengham, Chief Justice of the Common Pleas cited an old English proverb which may be regarded as a rather cynical version of the Roman dictum — Pater est quem nuptiae demonstrant. Hengham said: Whoso boleth my kyne, ewere calf is mine (Brit. Mus. Ms. 35116, f. 62 v).

or two facts which have given rise to the hypothesis that the people of the Germanic stock when they became known as a distinct ethnographic group still preserved features of the matrilineal arrangement in their life. In Tacitus' famous description of Germany in the first century A. D. (c. 20) there is a remarkable reference to the special place occupied by the mother's brother, the maternal uncle (avunculus) in the life of the family:[1] he is said to be regarded by the children with the same respect as the father, if not with greater, and to exercise a potent influence on their bringing up. Now the mother's brother undoubtedly plays a characteristic part in the matrilineal system: he is the nearest male relation, the usual protector of the household centred round the mother; she turns to him on all occasions when the assistance of a strong male is needed — in husbandry, in law disputes, and in feuds. Granted all this, let us notice, however, that in the case described by Tacitus the uncle does not supersede the father but appears by his side: a patriarchal arrangement is assumed as the foundation of society, while the uncle comes in to supplement it. The case appears as one of transition from the matriarchal to the patriarchal stage.

Another reference on which defenders of the matriarchal theory of Germanic family life rely is derived from the chapter of the Lex Salica treating of inheritance (Ch. 59, de alodis). It is the famous chapter appealed to in bar of succession of females to the Crown of France. The last clause of the chapter

[1] Tac. Germ. c. 20, 4. Sororum filiis idem apud avunculum qui ad patrem honor.

runs: de terra vero nulla in muliere hereditas non pertinebit sed ad virilem sexum, qui fratres fuerint, tota terra pertineat. There have been many disputes as to the reading and the meaning of this clause, although its general sense does not admit of doubt. We may compare the parallel passages of L. Rib. 56, L. Angliorum et Werinorum (Thuringian law) 34 and the later texts of the Salic Law itself. The Ribuarian rule is so clearly expressed and so evidently borrowed from the Salic that it may stand as an authentic explanation. [1]

The rule in question is opposed to matrilineal succession: the males, the sword side, succeeded in preference to the spindle side. But in the first four clauses of the Lex Salica the position is reversed. [2]

[1] Lex Ribuaria LVI 4. M. G. H. Legum V. Pertz, p. 240). 4. Sed cum viriles sexus extederit, femina in hereditate aviatica non succedat.

Lex Angliorum et Werinorum. (Thuringorum). 34. (Ibid. p. 128). Usque ad quintam generationem paterna generatio succedat. Post quintam autem filia ex toto, sive de patris sive de matris parte in hereditatem succedat; et tunc demum hereditas ad fusum a lancea transeat. Cf. Schroeder, 319.

[2] Lex Salica LIX. De Alodis.

I. Si quis mortuus fuerit et filios non demiserit, si mater sua superfuerit, ipsa in hereditatem succedat.

II. Si mater non fuerit et fratrem aut sororem dimiserit, ipsi in hereditatem succedant.

III. Tunc si ipsi non fuerint, soror matris in hereditatem succedat.

Add. I. Si vero sorores matris non fuerint, sorores patris accedant in hereditate.

IV. Et inde de illis generationibus quicumque proximior fuerit, ille in hereditatem succedat.

V. De terra vero nulla in muliere hereditas non pertinebit sed ad virilem sexum, qui fratres fuerint, tota terra, pertineat.

The father, the father's sister, the brothers of the mother are not mentioned: these omissions have been corrected in the later texts of the law, but the older version cannot have been set down in the MSS. of the earliest group without cogent reasons, and it seems obvious that stress was laid in the first two clauses on the rights of women in contrast with the last clause, which favoured men. Such an interpretation has, however, to be qualified in an important respect. The fact is that males are not wholly excluded from the earlier part. Brothers, evidently brothers of the deceased, are admitted to succession to property other than land (hereditas in the narrow sense). If we admit this, then the first three clauses would constitute a complete unit — the circle of the household, formed as usual in German law of the six nearest members of the „family peace" (sechs gesibteste Hände) with the exception of the father, who was probably assumed to be deceased. The peculiarity of customary succession under chapter 59 is thus narrowed down to the third clause, which mentions the sisters on either side. This must be taken as a distinct recognition of a privileged position of female relations in regard to movable goods: the brothers would still remain outside in the fourth clause, while this group would include the maternal uncles of whom so much is made in matrilineal arrangements. The whole chapter should be interpreted as a rough attempt at establishing a balance between males and females in the division of inheritance: the former are to take land and other real property connected with it; the women are to take moveable goods. Only the roughest outlines of the scheme ap-

pear in the barbaric version of the rule. In Salic Law the dispositions stop at the third „knee" according to native computations, parallel passages in Thuringian law proceed to the fifth „knee" or generation.[1]

It cannot be supposed for a moment that male heirs were restricted to succession in land only, without any claim to outfit appropriate to men, such as swords, spears, coats of mail, etc. All students of early law texts are familiar with their incompleteness and obscurity. The main point seems tolerably certain: if there are no children and no relations of the same household, the inheritance is to go to more distant relations, the males taking land and the females moveable goods; in the latter case it is possible that succession was further restricted — at least for a time — to female relations of the mother's kin. The occurrence of such a rule points to two things — to the high personal standing of women in this early society, and to the subordinate value of the moveable fortune in the customary estimates of succession.

Such a situation could not endure and was gradually transformed both in regard to land inheritance (see e. g. Marculf II, 12) and in regard to chattels. But its appearance at the particular epoch of the invasion of Roman territory by Frankish tribes is highly characteristic in itself and is connected with subsequent developments. It may be summed up in the view that the tribes, though organized on patriarchal lines, were far from treating women as mere objects for the satisfaction of sexual desires and as domestic servants, although women must have performed, according to

[1] Lex Angliorum et Werinorum, 34.

Tacitus' testimony, a great part of household work. They were under the hand (manus, munt) of the chief of the household, because they needed protection in the same way as children, but the authority and discipline exercised by their male protectors were not carried to logical extremes. The women in the Northern Sagas are often characterised by strong and independent personality: the Olga of the Kiev chronicle appears as a more powerful and resourceful ruler than her husband Yngvar (Igor).[1]

Even in blood feuds, although according to Norwegian law baugar, compensation rings, can be claimed by a rygr, a woman, only in the exceptional case when the man slain had only a daughter and no sons, mothers and wives have a definite place suitable to their temper and habits — they incite men to wreak vengeance. These psychological traits are consequences of a situation which has a social and legal background. The rise of patriarchal institutions did not result by any means in the isolation of mutually exclusive clans. Marriage provided connecting links between the various family groups; its most ancient form — marriage by capture — was thrust aside as permanent settlements were effected and peaceful relations established between the groups. The memory of the violent acquisition of wives was still preserved in wedding ceremonies, for instance in the „bridal run"[2] and occasionally the rape of a maiden was still practised for the purpose of getting a wife, but in the

[1] Cf. Sigrid Storråda, Heimskringla, ed. Unger, 177 f. Olaf Trygvason's Saga (Heimskr. 49).

[2] Bryllup; cf. Amira, Grundriss, 179.

centre of family arrangements stood the contract wedding. The essence of this act was not the personal consent of bridegroom and bride, but a treaty between two kindreds, one gathered around the bridegroom and his father and relatives, the other around the bride and her „mundvalt" (protector) and their kindred. The transaction was originally a variety of sale, the bride was bought by „mundr" — by a payment or promise of one (mundi keypt), and the binding ceremony consisted in the reciprocal affirmations, promises and gifts of the two parties[1] (Forlovelse).

We shall have to examine later on the economic features of this transaction; at present let us note the consequences of the fundamental fact that lawful marriage appears as a treaty concluded between two organized groups. Each of these groups centred round a patriarchal household and although some of the relatives of the bridegroom or of the bride would be connected through women — would come from the side of the mother, or the sister, or the maternal aunt, etc.. yet the kernel of the group was formed by the array of men to which the father of the bride as well as the father of the bridegroom belonged. In this way the marriage of the barbaric laws is in a sense an alliance between two agnatic sets, reinforced to some extent by assistance from various connections established through former marriages (affines, sakaukar, nefgilde). The juridical consequences of such an act consisted in the establishment of a definite recourse for protection on the part

[1] Amira, Nordgermanisches Obligationenrecht, I, 533 ff., II, 659 ff.

of the wife and her children. She is not cut off from her kindred; on the contrary her brothers, cousins, uncles, remain her protectors even after the death of her father, she looks to them for help and vengeance if she is aggrieved in her new married state. This is clearly expressed in the last clause of the Anglo-Saxon wedding instruction and in the Icelandic Grágás.[1]

In the Sagas we have instances when the cause of married women was taken up by their kinsmen against their husbands. For example, in Vathfirðinga Saga (Miss Phillpotts p. 17) Geitir killed Prodhelgi, the husband of his sister, who sent her away because she was ill.

Two consequences result from the above mentioned fact in respect of the juridical situation in the early Middle Ages:

I. The patriarchal household serves as a basis for agnatic relationship, which does not develop, however, into regular clans as with the Celts, but nevertheless exercises a powerful influence in protecting its members by organizing land settlements and bloodfeud groups.

II. The alliances between agnatic families place the children issued from contract marriages in a double set of relations — they belong both to the father's and the mother's family and in their persons a combine arises and grows which receives the significant name of peace group (sibbja, sib, Sippe). Its kernel is formed by the household proper in which both male and female elements are represented (father, mother, brothers, sisters); outside this household extend the ramifications produced on both sides of the

[1] E. g. Sturlunga Saga, II, 127 (ed. by Kalund). Miss Phillpotts, p. 17, 30.

parents' union in contract marriage (máldaga). With some nations these ramifications are traced not only to the original pair of the parents, but to the two pairs of grandparents and the four pairs of great-grandparents. (Frisian Slacht, Fecht and Kluft). In most cases, however, only two main sides are taken into account — that of the father (faterni) and that of the mother (moðerni). Their relative importance is expressed in the proportion assigned to each in the composition for homicide: the father's kin gets two thirds of the fine reserved for relatives outside the household, while the mother's kin gets one third. It should be noted that the proportion is identical in the Celtic customary law of Wales and in the Anglo-Saxon system: there is no reason to suppose that it was the result of actual borrowing by one race from the other, we probably have before us a similar result produced by a similarity of conditions.

We must keep in mind that the realities indicated by legal rules, even by customary rules, are not the occurrences of daily life, but schemes of what ought to be done on an average. Such schemes are important and suggestive, but we need not wonder if we learn from the newspapers nowadays or from narratives of the past that they are being disturbed again and again by exciting adventures. Some students of Icelandic literature have expressed surprise at the fact that the feuds and slayings in the Sagas have not been conducted in accordance with the Baugatal of the Grágás; that the conflicting parties are not arranged on correct lines of kinship; that the shares of wergelds are not assigned exactly in accordance with the tariffs

of the law. Such critical remarks are based on a fundamental misunderstanding. The laws tell us what ought to be if society lived according to rule; the Sagas appeal to our imagination by narratives of interesting and exciting happenings. Besides, in the life of the chiefs, the „goðar", the struggle for power and personal passions played a much more prominent part than in the humdrum existence of the peasants.

The aim of legal marriage is to raise legally protected offspring. Informal cohabitation is sufficient for the purpose of sexual intercourse and the „concubinate" (kebsehe) is recognized as a social institution. It may ripen in some cases into a legalized marriage: the law of Jutland, for instance, recognizes such a process in connection with prolonged sharing of bed and table, key and housestore.[1] Nor is the position of illegitimate children an entirely precarious one: they are supported as a rule by their mother and her kin; in some customary systems they join the father's household with certain rights as to outfit and alimentation.[2]

But the predominant consideration in the building up of a family is to beget legally protected children, that is, offspring supported on both sides by the peace-group of the allied kindreds. This helps to explain the insistence on the formal contract of marriage between kindreds in the laws of Norway and of Sweden.[3]

[1] Jydske lov. I. 27. Cf. the legitimation of the Roman marriage without manus (Gaius, I. 111).

[2] Amira, Grundriss, 184.

[3] Cf. Amira, Nordgermanisches Obligationenrecht, I, 522 II, 660.

I may perhaps be allowed to remind you that in this respect we come across a remarkable analogy with the juridical conception of marriage shown in the „well-fathered" (Eupatrid) families of Ancient Greece and the patriarchal gentes of Rome. The contractual marriage of ancient Greece was celebrated ἐπὶ παίδων γνησίων ἀροτῷ, the confarreatio and coemptio of Ancient Rome were concluded liberorum quaerendorum causa.[1] From this point of view the chief stress lay on the building up of a strong household, not on the gratification of individual affection. This supplies the key for the explanation of certain curious features of customary law. In contrast with the teaching of the Church, which does not recognize a divorce between two human beings united by a sacramental tie, in systems dominated by the idea of family growth dissolution of marriage by reason of sterility of the wife is necessarily admitted. This was so with the Hebrews, the Greeks, the Romans, and so it was with the Western European nations in the Middle Ages. We find corresponding rules and concrete instances of their application in many systems of customary law.[2]

An outcome of the same preoccupation may be seen in the practice of trial unions. I have here in view not irregular cohabitation, but formal unions which serve as an introduction to complete marriage. In Ireland there were certain occasions when such coibche unions were celebrated publicly in the pre-

[1] Cf. Outlines of Historical Jurisprudence, I. p. 243.

[2] Brunner, Zeitschr. der Savigny Stiftung, Germ. Abth. XVI, 105.

sence of kinsfolk of both parties, with the reservation that if no pregnancy ensued in the course of a year the marriage was to be dissolved. The same practice is recorded in countries with a Germanic or with a mixed population.[1] The wide diffusion of this custom may explain the important rule that community of goods is not usually established between spouses before a year and a day have passed after the wedding[2] or before a child has been born or is expected to be born.

The general conditions described above had obviously a decisive influence on the inner organization of the household as well as on the groups of kinsmen and connections surrounding it. The household was dominated by paternal authority: it was certainly not the complete patria potestas of the Romans, yet the Mund of the barbarians implied considerable power. As to children the father had the right to expose them after birth, and to sell them in case of great hardship (echte Not). On the other hand custom enjoined him not to kill a child if he had once recognized it by taking it up in his arms.[3] The son became emancipated when he left the paternal house and started on a business of his own — as a farmer, craftsman, merchant, soldier, seafarer. Life in common in a household headed by the father, grandfather, or elder brother was, however, very usual, and it involved a responsibility of the head of the family for the

[1] Ibid., 92 ff., cf. Ehrlich, Grundlegung einer Soziologischen Jurisprudenz.

[2] Paul Viollet, Histoire du droit civil français, 780.

[3] Cf. Von Salis, Zeitschrift der Savigny-Stiftung, Germ. Abth. VII, 137 ff.

acts of its members.[1] Emancipation by leaving the family (Forisfamiliatio) was therefore a matter of public as well as of private law, the counterpart of adoption. Within the household the father or headman had the right and duty to maintain discipline and to wield a power of correction which could not be strictly defined and varied a great deal with the age and character of the persons concerned.

The relations between husband and wife were more open to strictly juridical treatment. We have already seen that the wife was by no means at the mercy of her husband, as she could seek support and protection from her kinsmen. But the intervention of the latter was an extreme measure and in ordinary circumstances she had to submit to the reasonable exercise of marital power (manus, mund). Her husband could inflict corporal punishment or imprison her with a view to correction, and customary pronouncements are sometimes very emphatic in this respect.[2] Needless to add that the discovery of flagrant adultery exposed the faithless wife to the death penalty at the hands of the offended husband. The subject of the management of property arrested the particular attention of popular judges and customary experts. Burgundian Law contains the most striking expression of the power of management conceded to the husband. Its 100th clause runs: quaecumque mulier Burgundia vel Romana voluntate sua ad maritum ambulaverit, jubemus, ut maritus ipse facultate ipsius mulieris, sicut in ea habit potestatem, ita et de res suas habeat. This does not mean that the fortune of the wife passed into the

[1] E. g. Beaumanoir, Coutume de Beauvaisis, ch. XXII.

[2] Brunner, Deutsche Rechtsgeschichte, I, 2, 99.

ownership of the husband, but that as long as their marriage union continued he was considered the manager of it. The general statement gives rise to several special rules. The wife could not alienate her property without the consent of her husband, while he could sell or pledge her property, and his act would be valid and protect the purchaser or creditor during the life of the husband. [1]

A married woman could not appear in justice either as a plaintiff or as a defendant in civil actions without the aid or consent of the husband. In Norman England the juridical situation led to the development of a characteristic action — the writ of entry granted to a widow who wanted to annull some act performed by her late husband in respect of her property on the ground that she was unable to contest the act while he was alive. [2]

The possibility of such retrospective actions shows that the right of the husband as manager did not supersede the property rights of his wife, but paralysed them, as it were, during his lifetime. When we look to the interests involved, we find that they arise from two principal sources — from gifts, bequests and successions derived from the woman's family of birth and from gifts, bequests and succession originating with the husband. [3] The fact that a woman left her native

[1] Schroeder, Deutsche Rechtsgeschichte, 309.

[2] For the claim of a widow to resume property disposed of by her husband — „cui in vita contradicere non potuit" see e. g. Selden Society Year Book Series, II. 33, 123, 142, 150.

[3] Besides these two classes there is that of acquisitions (acquets, purchases) made after the marriage. It would lead us too far afield, to consider this variety on the present occasion. Cf. Brissaud, Manuel de droit privé, 592.

home in order to get married was the occasion of settling an outfit on her: it was her faderfio, her maritagium, analogous to the dos of the Romans. The share allotted to her was of the same kind as the outfit received by a son when he left his original home in his father's house and set up in life for himself.[1] A conspicuous part of this outfit was formed by the woman's clothes, her trinkets, her furniture and linen, but in well-to-do families she took many things besides, sometimes even land.

On the other hand, the contract of marriage led, as a rule, to a settlement of property by the husband on his bride, the wituma, dower, dos in the customary law of Northern France and England, the meta of the Lombards. The object of this settlement was to assure the existence of the wife during marriage and particularly in case the husband predeceased her. The customary rules governing this assignment, when it had not been made by agreement, varied between one fourth of the property of the husband (Lombards) to one third in feudal England (Glanville, Bracton) and one half in feudal France (Beaumanoir).[2] These settlements have to be distinguished in principle from personal gifts made on the occasion of the wedding — the presents of the bride to members of the bridegroom's family and the morning gift (morgengabe, morgenjöf) of the bridegroom to his wife on the morning after marriage. In practice these various gifts were often amalgamated with the principal settlements.[3]

[1] Paul Viollet, Histoire du droit civil, 497.

[2] Cf. P. Viollet, op. cit., 776 ff.

[3] Cf. Amira, Nordgermanisches Obligationenrecht, I. 533 ff.

In treating of inheritance we ought to notice the point that the dead man was personally entitled to a part of the moveable property owned by him on the day of his decease. In heathen times this dead man's share consisted in goods piled up on his pyre or buried with him and of the expenses of his funeral in food, drink, ornaments etc. A classical description of this dedication of goods to a departed warrior has been given by Ibn Fadhlan, an Arabian traveller, who witnessed the burial of a Russian chieftain on the banks of the Volga in 921. One third of the goods belonging to the deceased were piled up in the ship on which his corpse lay in state.[1] This narrative is corroborated by the report of another Arabian traveller — Ibn Dustah. After the conversion to Christianity this custom did not disappear, but the third assigned to the deceased was spent for the benefit of his soul under the direction of the Church. Glanville[2] and Bracton mention the customary rules in this respect: one third of the goods constituted the share of the deceased, a second share went to his widow, a third to his right heirs. These provisions constituted the foundation of the English law of intestate succession until 1853, when the jurisdiction of probates of wills

[1] Outlines of Hist. Jurispr. I. p. 275.

[2] Glanville, VII. 5. 4. Cum quis in infirmitate positus testamentum facere voluerit, si debitis non sit involutus, tunc omnes res ejus mobiles in tres partes dividentur aequales; quarum una debetur haeredi, secunda uxori, tertia vero ipsi reservatur; de qua tertia liberam habebit disponendi facultatem: verum si sine uxore decesserit, medietas ipsi reservatur. De haereditate vero nihil in ultima voluntate disponere potest, ut praedictum est. Cf. Bracton, Fol. 60 b.

passed from Ecclesiastical Courts to secular tribunals together with the duty to dispose of the personal estate of those who had died intestate. The affectation of a part of the goods to the spiritual needs of the deceased is not a peculiarity of English law: there is evidence to show that it was practised in Normandy and in countries subject to Norman influence like Brittany and Sicily, in Northern France and in Germany.[1] The size of the share and its relation to property which had been owned in common by the spouses vary, but the notion of a dead man's claim to a part in the goods is widely spread and enduring.

Another characteristic conception of customary law is expressed in the saying: Paterna paternis, materna maternis. A concrete application of the rule is to be found in the Lex Alamannorum, 95; it treats of the death of a woman who has given birth to a live child which dies immediately after having opened its eyes and uttered a cry. The mother's fortune falls back to her father, obviously because the blending of inheritances in the person of a child has been prevented by its death.[2] The rule is interesting in so

[1] Brunner, Zeitschrift der Savigny-Stiftung, G. Abth. XVI. 107 ff.

[2] Lex Alam. XCV. Si quis mulier, qui hereditatem suam paternicam habet, post nuptum et prignans peperit puerum, et ipsa de partu mortua fuerit, et infans vivus remanserit tantum spacium ut vel unius horae possit aperire oculos et videre culmen domus et quatuor parietes, et postea defunctus fuerit: hereditas materna ad patrem eius perteneatur. Tamen si testes habuisset pater eius, qui vidissent illum infantem oculos aperire et potuisset culmen domus videre et quatuor parietes: tunc pater eius habeat licenciam cum lege defendere; cui est proprietas ipse conquirat.

far as it testifies to the continuance of an economic tie between a married woman and her kindred even after she had joined the household of her husband.[1] Important problems arose from this situation on the dissolution of marriage by death or divorce. Let us consider the first and common eventuality and take as an illustration one or two clauses from the Skaanske lov (XIII century):

II. 2) If the mother and her kinsmen say that a child was born . . . . And the kinsmen of the father deny this, let the mother bear testimony in contradiction with two witnesses and twelve men elected out of her kin (naefndom) that the child was born so help her God, and that the child was born with nail and nose, with skin and hair, and was baptized, and it shall thereupon stand as an heir.

I. 5) If the son of a husbandman (peasant farmer) marries a wife and brings her into his father's household (patrimony) and begets children with her, and there is no community between them, and the husbandman's son dies, let his children take a full share after their father in the wife's land as well as in furniture (implements?), but of paternal inheritance they shall take nothing, unless he will give them something. If there was community among them, then they shall take no more than what he owned in the household.

[1] Schroeder, Lehrbuch der deutschen Rechtsgeschichte, 296 ff. Cf. Outlines of Hist. Jurispr. pp. 253 f.: „If she (the bride) is taken out of the land into another lord's land, then it is advisable that her kinsmen get a promise that no violence will be done to her, and that if she has to pay a fine, they ought to be her next to help her to pay, if she has not enough to pay herself." Liebermann, Gesetze der Angelsachsen, I. p. 442.

Several interesting points are to be noted in these clauses:

1) The winding up of the inheritance depends on the birth of a fully formed child, if, according to the later law, it has been baptized.

2) The property of the wife remains separated from that of the husband unless there is an agreement as to community of goods between them. In Arne Suneson's Latin version this rule is rendered: si bona quae habuerit cum uxore fuerunt definita.

3) The settling of a married son in the plot of his father was evidently a usual practice which might give rise to disputes and had to be definitely regulated in accordance with customary law.

It would be impossible to mention all the numerous variations of these principles in Scandinavian laws, but I cannot conclude this discussion without adding one more reference — the much discussed 54th clause of the Gulathingslov: „The present given to the wife shall be secure, whatever may be the cause of separation (from the husband). The bridegroom shall acquire by his mundr all the goods given to a maiden as her outfit, and there shall be accounted (on his part) oere against oere of the maiden's goods, but as to a widow's goods there shall come half. The acquisition of the mundr shall be secure in all cases except two, namely, if she dies without children and if she leaves him without cause."[1] This clause lays stress on the reciprocity between bride and bridegroom

[1] Cf. Hertzberg, Om de gamle loves mynding. Christiania Vidensk. Selskabs Forhandlinger, 188, nv. 3. Cf. Olivekrona Makars giftoret i bo, 5 udgave, s. 180.

demanded by Norwegian custom in respect of their contributions; the mundr and the moveable property brought in by the bride should be exactly equal if the latter is a virgin, while a widow is entitled only to half the amount of her contribution. The Danish system was obviously not affected by this consideration, if we may judge from the rule of Skaane cited above, while the Western European dower is entirely independent of the contribution of the wife and represented in any case a life interest in one half, one third or one fourth of the husband's property.

One more problem remains to be considered, namely the part played by the wider circles of relationship in social organization. The genealogiae of the Lex Alamannorum engaged in a trial as to their boundaries are not chance settlements of Smiths or Browns: they appear in the record of Alamannic legal customs as the normal landowning units, and it is not conducive to an understanding of the historical character of an epoch to explain away its peculiar conceptions and terminology by substituting for them the colourless notions of our own days.[1] Nor is it at all likely that the maegths of Anglo-Saxon law or the farae of the Bavarians were loose terms pointing to relationship and not to designations of the actual groups which carried on feuds, received and paid wergelds, swore compurgatory oaths, assisted destitute members of the kindred, protected married women, and undertook in certain cases the guardianship of minors, etc. The renunciation of the membership of such a group with its active and passive obligations was a formal act of

[1] Pollock & Maitland, History of English Law, II, 241.

importance, as we may judge from Salic law (De eo qui se de parentilla tollere vult) and the admission into such a group, fraught with various juridical consequences, was solemnized in Norwegian custom with no less ceremony (Gulathingslov, admission into the aett). In course of time the ties of kinship were undoubtedly relaxed through the action of various forces — the progress of individual enterprise, the interference of feudal and national authorities. Yet the influence of tribal conceptions made itself felt right through the Middle Ages in a more or less definite form. Its chief manifestations may be found in the law of succession and in the restraints on alienation connected with this branch of the law. Customary records trace succession in many countries to distant degrees: it is not unusual to find the fifth generation marked as the limit of possible claims:[1] this would extend the frontier to fourth cousins in the collateral lines with a corresponding rounding off in the case of uncles, aunts, nephews and nieces. There are cases when it extends even further. The sequence in which the relations are ranged in regard to inheritance vary a great deal, and prominent scholars, especially Ficker, have made them the subject of investigation and far-reaching hypotheses. I confess to a great deal of scepticism as to the results obtained in Ficker's six volumes on „Erbenfolge".

On the other hand, the sequence of possible heirs has given Brunner and Amira materials for interesting, although less far-reaching inferences. The tables of succession as presented by Germanic customary sour-

[1] Cf. Seebohm, Tribal Custom in Anglo-Saxon Law 76.

ces are built up on the system of socalled stocks, stirpes, parentelae. When the narrow family has been exhausted, collateral relatives are admitted to succeed in such a way that the descendants of the grandparents come first, the descendants of the great-grandparents afterwards, and so on. This means that uncles, first cousins and nephews issued from them have precedence over great-uncles, second cousins, and their descendants. In other words the order of succession reckons with ascending lines of households — with relatives derived from the household of the father admitted in preference to those issued from the household of the grandfather etc.[1] It is obvious that this scheme of succession is connected with an arrangement of kinship on the basis of patriarchal households: a reckoning derived from proximity by blood would suggest a different sequence and give precedence to near cognates over the offspring of representatives of „distant parentelae", e. g. to a mother's nephew over a second cousin claiming as a grandfather's descendant in the absence of any representative of the paternal household.

The ties of kinship find another expression in the right of relations to keep landed estates from passing into the hands of outsiders. The most conspicuous example is that of the Norwegian Odal, a form of property characterized by the rights of preemption and redemption on the part of members of the family. The same principle appears in a much more intensive form in earlier stages of customary law. Charters of donation and sale issued before the XIIth century mention

[1] Brunner. Deutsche Rechtsgeschichte. 114. 116.

very often the consent of kinsmen.[1] Later on the retrait lignager — the right of preemption and redemption by kinsmen was considered to be established by common law in Northern France.[2] It occurs even in the South, in the region of the Romanesque law (droit écrit).

It is probable that another limitation of individual property — the socalled retrait de voisinage, the right of neighbours to prevent alienation to outsiders by offering preemption and by redeeming plots already sold, originated in the same solidarity between kinsmen, settled as neighbours in a locality. There are curious traces of this territorial cohesion in Frankish sources. The XLVth title of the Lex Salica (De migrantibus) makes the settlement of immigrants on the soil of a village dependent on the unanimous consent of the householders; a decree of King Chilperic,[3] issued in 571, ordains that inheritance — evidently a hereditary plot — should not pass to the villagers (vicini) but to sons or in their absence to daughters, to brothers or sisters. This amounts not only to an alteration of the Salic Law as to the exclusion of women from inheriting land, but also the prohibition of pas-

[1] Pollock and Maitland, History of English Law, II, 246 ff.

[2] Paul Viollet, Histoire du droit civil français, 563.

[3] Edict. Chilperici, Cl. 3. Simili modo placuit atque convenit, ut (quicumque) vicinos habens aut filios aut filias post obitum suum superstititus fuerit, quamdiu filii advixerint, terra habeant sicut et lex Salica habet. Et si subito filii defuncti fuerint, filia simili modo accipiat terras ipsas sicut et filii si vivi fuissent aut habuissent. Et si moritur frater, alter superstitutus fuerit, frater terras accipiat, non vicini. Et subito frater moriens frater non derelinquerit superstitem, tunc soror ad terra ipsa accedat possidenda.

sage of inheritance to the neighbouring householders of the village. As the decree favours only members of the immediate household of the deceased, we are led to surmise that the vicini represent the body of collaterals constituting the kindred.

However this may be, the all but universal occurrence of customs designed to restrict alienation testifies to the powerful influence of kinship in the customary law of Western Europe. The retrait lignager was in full working application in France until the Revolution, when it fell before the doctrine of individualistic enlightenment: it was abolished by a decree of the Constituent Assembly July 1789.

CHAPTER FOUR

RIGHT OF APPROPRIATION

I.

The English language brings forcibly to our attention the fact that legal situtations can be considered from two different points of view. We distinguish between law and right, while in most European languages both notions are combined in generic terms and have to be distinguished by the help of adjectives[1]. When we speak of law in English we mean the legal order instituted and enforced in a community; when we speak of right we mean usually a power exercised by each person under this legal order. In Norwegian the term ret covers both things, and we have to distinguish between „den objective ret" and „den subjective ret" if we want to render the contrast between law as order and right as power. The same is true of the German Recht, of the French Droit, of the Slavonic Pravo. Such peculiarities of expression are not accidental nor superficial; they point to important distinctions, and

[1] See Vinogradoff, The Foundations of a theory of Right, Yale Law Journal, 1924, November.

the terminology which we are examining at present is connected with a fundamental problem of jurisprudence. Law, den objective Ret, is evidently a creation of society acting by means of the State, or through some other channel of social organization, e. g. the Church or an autonomous community. But what is to be said of right? Why is right contrasted with law in English, while Recht stands both for right and for law in German, Jus in Latin, droit in French, pravo in Slavonic languages? Obviously the nations of Continental Europe laid stress in their terminology on the unity of legal order, on the fact that it is constituted, governed and directed by the general authority of the Commonwealth. On the other hand the English-speaking nations distinguish in terms between two aspects of the juridical arrangement — between the public settlement of law and the consciousness of right rooted in the last instance in the conviction of each individual member of the community and influencing his will to exercise his power.

The classical doctrine situated between these extremes started from the fact of the will: law is the aggregate of rules imposed by the will of the community, right is the range of action of the will of individual persons — either physical or juridical. To the will and power to constrain corresponds the submission of one person to another person's will. Windscheid defined subjective right as the power to require a certain behaviour, action or abstention from another: this is the exercise of will power (Willensmacht).[1] Ihering, on the contrary, laid

[1] Windscheid, Pandekten § 37. It would lead us too far afield to enquire into the relation between Windscheid's conceptions of „Willensmacht" and „Willenscherrschaft" Cf. Duguit Traité de droit constitutionnel, II, 180 ff.

stress on the bareness of definitions derived from the simple concept of the will. There is no will without aim and no right without object. The aim in relation to human beings must necessarily be some kind of utility (Genuss) and therefore subjective right is indissolubly connected with interest. However, in order to obtain recognition and security, an interest must be protected by the State, and therefore the proper definition of right in the subjective sense is that it is a protected interest.

Ihering's analysis did not remain without effect, but its main result has been to induce a number of leading jurists to adopt a dualistic conception of subjective right. Bekker, Jellinek, Michoud[1] have all come to the conclusion that although will isolated from practical aims would be a force operating in vacuo, although no will acts without something willed, yet on the other hand no interest rises to the dignity of a right by mere protection, and its realization depends on the action of some human will. In the case of the infant or the insane the acting factor of the will is supplied by the community which considers it necessary to step in as a protector of interests which would otherwise fall into abeyance. Right, then, may be and is commonly understood as what a man considers to be right from his personal point of view. Law is right as laid down by a force which is above the parties, whose task is to arbitrate between the various claims and to harmonize them as a whole. The elements of a right are necessarily three. To begin with, in order that the right should be realized

[1] Jellinek, System der subjectiven öffentlichen Rechte, 39 fl. Michoud, Théorie de la personnalité morale, 99 ff.

it must be claimed by some one. As it is subjective in its origin it must originate in a striving of the subject — the subject must assert something as of right. The subject may be an individual or a group or a State. The State has greater means of urging its claims, but it stands on a par with any other subject as regards the assertion of right.

Claims are made every day in all possible directions and out of claims there arise sometimes what may be called natural claims, or moral rights. A man who has conferred a benefit on another person, even if he has no kind of written and valid acknowledgment in regard to the obligee, may rightly say that he has a claim to the gratitude or to reciprocal services of the other party. In order that such a moral claim should become juridical, it must pass through a second stage, the stage of declaration of right. A declaration of right is the admission by organised society that the claim is justified from the public point of view. As a rule, such justification enables the person whose claim has been juridically recognised to bring an action and to seek satisfaction in the courts.

Lastly, right in order to be complete and satisfied must be enforced either by the moral authority of the social organization or by actual compulsion. This element of sanction is potentially implied in most cases, but not in all; on many occasions, though right may be undoubted and declared by authority, the party against which the declaration has fallen may escape the obligations incidental to it: it may prove to be outside the reach of the subject of the right. This is notoriously the case in conflicts between sovereign

States. Although the rules of international law may be quite clear, their application may be guaranteed by nothing better than the selfhelp of the aggrieved party. Such cases are more rare in private law nowadays, because the authority of the State is called upon to intervene and to provide sanctions, but historically private conflicts have also been subject for a long time to settlements in the nature of declarations rendered effective by selfhelp.[1]

In examining rights to things (Sachenrecht) we have to start from the general notion of appropriation[2] of things by persons: the distinctions between property and possession familiar to lawyers are the product of slow growth, of a differentiation of the general concept.

Appropriation is not the outcome of reasoning — it is prompted in man and in animals by the instincts of selfpreservation and selfassertion. A dog that has got hold of a bone feels as an „owner" and resents interference with his right of appropriation. No living creature can exist without attracting and using for its own purposes material goods within its reach. The rudimentary idea expressed by the word belonging (or to belong) appears as an extension of physical personality. The spear in the hand of the savage is an extension of the power of his arm, the skin on his shoulders, the shelter of a cave are substitutes for a natural protection against cold and damp. Right from the earliest times one may distinguish three main sources of appropriation: goods come to belong to men

[1] The appeal and trial by battle is one of the principal manifestations of this selfhelp. Cf. Amira, Grundriss, 275.

[2] Cf. R. Lacombe, De l'appropriation du sol, Paris, 1912.

either because they have been taken direct from the store of the surrounding world, or because they are the products of work or exertion, or lastly because they are obtained by the assertion of personal superiority over others. Occupation, labour and domination are the three forms of original acquisition.

Occupation is obviously the simplest and the most elementary one of the three, as it arises directly out of the relation between the individual and nature: the things taken or occupied are deemed to have belonged to no-one before (res nullius). A traveller who draws a bucket of water from a stream to quench his thirst and to provide a drink for his horse, a party of negroes who feed on the abundant fruit of a datepalm are receiving benefits from a communion with nature not opposed by any rival claim. There are still wide tracts of wild pastures in prairies and steppes in which people may roam about without being confronted by artificial restrictions of any kind.

The condition of such tracts may be regarded as exceptional nowadays and their area is gradually dwindling. In the course of this process rights of occupation have to be established, proved, and gradually restricted or „stinted": and for the sake of peace concurrent claims have to be urged and adjusted by custom or by law. On Dartmoor and in the fens of Eastern England[1] thousands of head of cattle wander indiscriminately on the vast pasture areas of the regions, but the settled householders take care that „foreigners" shall not smuggle

[1] Cf. Miss Neilson, Introduction to Ferrier of Fleet (Records of Economic and Social History), publ. by The British Academy, IV, XII.

in their cows and sheep, and once or twice a year the fellow-commoners perform a solemn act of „driving the common", marking the animals entitled to use it and impounding cattle belonging to outsiders. Manorial pastures were protected by similar means against the invasion of sheep which had not been „couchant and levant" in the precincts of the community, i. e. owned by the villagers for some time. [1]

A curious illustration of the process of restricted occupation is presented by the customary rules as to the appropriation of bees and of their products. The gathering of honey and wax is one of the most ancient and important processes of appropriation in Europe and Asia. It must be remembered that before the discovery of the sugar cane honey played the part of sugar and could be turned by fermentation into delicious intoxicating mead (mëd) [2]. This valuable substance, and also the wax, was collected in the forests from the hollow trunks of trees in which wild bees had deposited their stores. The occupation claims of the first discoverer were not disputed in such cases. If a settler in the forest, after discovering melliferous colonies of this kind proceeded to appropriate for himself the trees which served as homes to the insects, restrictions were imposed. By Lombard and other law, an appropriation of this kind could be effected by marking the trees in question with recognized signs, [3] but the marking held good only for the term of one year, and was to lapse if the wax and honey had not been actually collected in the mean time.

[1] Cf. Miss Neilson, op cit.
[2] Schrader. Reallexikon, 88.
[3] Grimm. Rechtsalterth, 4, II. 135 ff.

If a swarm of bees left its old abode and flew over to a tree or a hive belonging to another settler, Germanic custom allowed the previous host of the beeswarm to invite it to go back to its old home by three raps on the trunk of the tree with his fist or the back of an axe. Gaius has left us information on the same subject in a wellknown chapter of the Digest (XLI, 1). He lays stress on the „wild nature" of bees (animalia ferae naturae) and the impossibility of appropriating them permanently. In their swarming seasons they are apt to relapse into a state of nature, so that they can be appropriated afresh by occupation.

Another characteristic group of cases arises from the assertion of concurrent interests in the occupation of land. The rush of diggers for gold and silver in California and Australia led to peculiar customs in notifying and maintaining claims: it was established by custom that if a man had thrown his tools or some coin into a trench his neighbours had to keep away from the „prospected" area for a short time, but the claim had to be substantiated by effective exploitation in order to become a durable one. We are told that something similar took place in connection with the occupation of land by intending farmers when the Indian reservation was opened for agricultural settlers in Oklahoma, and immigrants who had been gathering on the border rushed in to occupy plots convenient for cultivation. Ancient and primitive law abounds in practices of this kind; I will just mention one instance, — the occupation of soil by Scandinavian pioneers in Iceland. As the first act of preparing the land for cultivation was to burn the forest and wild grass, the

symbolic procedure of taking possession of an area was to mark it off by encircling it within a given time by a line of fire.

The feature of juridical interest in such proceedings is not only the recognition of the initial claim, but the limitation of this claim by the necessity of maintaining it by effective use and the corresponding abandonment by lack of usage.[1] Parallels to these early forms of occupation may be found in the practice of modern international relation.[2]

The transition from occupation to labour as a source of appropriation is not an abrupt one: the practices of setting traps, of laying nets supply links between lying in wait for a prey to come in and the recourse to force and skill in fishing or in the pursuit of game. I need not dwell on varieties noticed by anthropologists — on the distinctive features of petty hunting practised by primitive groups like the Veddas of Ceylon and the big hunting of the North American or the African tribes. The passage from one variety to the other is determined mainly by geographical conditions, but also by the pressure of increasing needs and the consequent necessity of greater exertion. The task of the hunter may sometimes involve great hardships and considerable efforts; the huntsman of Northern Russia has sometimes to follow an elk for several days on skis until its legs are so sore from breaking through the thin icecrust that it lets him approach within convenient distance for a shot.

[1] Amira, Grundriss, 199.

[2] E. g. The Berlin Conference of 1885 marked off the spheres of influence of European powers in Africa in accordance with effective occupation.

No cleavage can be established therefore between acquisition by hunters or fishermen and the labour of pastoral or agricultural people. Indeed the laws of Manu assimilate the appropriation of a field under crop by tillage to the shooting of a stag by the hunter.[1] On the other hand such a right of appropriation lapsed if the plot had not been cultivated for five, three or one year; the plot reverted in such a case to the condition of soil open to anyone's occupation.[2] Nevertheless the economic background and the juridical consequences of these systems differ in many respects. To begin with, the pursuits of hunters tend naturally, as well as those of warriors, to the formation of male belongings, especially weapons — the boomerang, the bow and arrows, the spear, the sword, etc. These belongings are so closely joined to the personality of a strong man that they may be considered as his special „war outfit" (heergewaete).

The study of ethnological materials reveals the fact that the privileges of the male sex were also connected with primitive pastoral practices. The tamers and masters of the horse, horned cattle, the pig were originally the strong males: it is significant that the milking of the cows is often deemed to be males' work in ancient society. On the contrary, primitive cultivation of the soil was a task for women — the females of hunting tribesmen started by collecting acorns, mushrooms, wild beans, barley, maize; in searching for these they made use of a pointed stick which was eventually supplemented

[1] Manu. IX, 43, 44. Jolly, Recht und Sitte (Grundriss der Indo-Arischen Philologie) 91.

[2] Narada, 23, 27.

by a pick-axe (Hacke) to break up sods and by a crooked root or branch, which served as a ploughshare.[1] The digging of roots was the first step in agriculture; the harvesting of nutritious herbs and corn, the sowing of seeds, the accumulation of stores in foresight of lean seasons followed in a natural sequence. All these labours are by primitive tribes considered as women's work. Tacitus has testified to that state of affairs in a famous chapter of his Germania (c. 15). Such a division of labour between males addicted to hunting, fishing and pastoral pursuits and females busy with the cultivation of plants and with housework led to curious habits. With some tribes men and women take their meals separately, the males indulging in meat and milk while the women are restricted to vegetable diet.[2] When such a distribution of tasks was allowed to develop, „*matriarchal*" *arrangements came into being in the sense* that women obtained rights of management in connection with their duties. The hunting tribes of the North American Indians or the caste of the Najars of Malabar may serve as examples. In most cases this distribution of labour and goods gives way when more complicated social conditions set in: the wives and daughters undertake pastoral tasks like milking and dairy work, while the men have to put their hand to the heavy plough. Even in these modified conditions the idea of special belongings to be assigned to each sex was not abandoned. While the war outfit, the heergewaete (heriot) is supplemented by the inclusion of horses and cattle, there appears the Gerade, the implements of the

[1] Lippert, Kulturgeschichte der Menschheit, I, 294 ff.

[2] Lippert, 168.

wife. The latter consisted mainly in her clothes and personal ornaments, but also in furniture, beds, boxes, etc.[1] Land is assigned to the spearside in the Thuringian Code already cited (31, 6) and in many other barbaric custumals. Let us notice that ancient law recognizes the right of appropriation by intellectual and spiritual labour as well as by manual labour.[2] In Brahmanic India religious knowledge, castigations, courage, teaching, sacrifices are sources of property. We may compare the material endowment of Churches and Convents in the Middle Ages. Druidic privileges in Celtic tribes, and the privileges of medicine men and magicians in primitive society.

The element of personal superiority plays a great role in early society. It is indeed inherent in any effective organization in so far as common enterprises cannot be carried on without leadership and submission to a certain discipline. But in the earlier epochs which, let us remember, have had a most powerful influence on later law, we have to allow for much more than such rational subordination. Social hierarchy was constituted by harsh forms of subjection. The idea of appropriation is very noticeable in the constitution of the early patriarchal family. The conquered or purchased wife of an Australian or African tribesman is a valuable property asset, as a servant of all work. Although, as we have seen, this crude conception gave way by degrees, primarily under the influence of protection by the wife's kindred, the dependence of a married woman on her husband endured right through the ages

[1] Grimm. II, 113 ff.
[2] Jolly, 90.

up to our own time.[1] The relation of a father to his children, again, centred for a long time round the notion of property. It is the fact of their having been born on a bed belonging to the chief of the family that is decisive for their attribution to him as the father of the household.[2] The maxim „pater est quem nuptiae demonstrant" is only the reverse of the medal.[3]

Slavery is too wellknown to require discussion, but I should like to call attention to the fact that it is by no means the only or the easiest form of exploitation of human labour. It requires for its proper working on a big scale effective supervision and coercion which cannot always be provided in barbaric society. Apart from domestic servants who do not play a very important part in general economics, slaves may be said to have formed the basis of the social fabric in cases like those of Oriental despotisms of the Egyptian and Assyrian type, in Greek cities, in the Roman Empire, in the African pirate States, in Spanish America, and in the Southern States of the North American Union. There would be a good deal of truth in the paradox that property in slaves requires a high degree of political organization for its full development. It is only towards the end of the XVIIIth century in Russia, under Catherine II, that peasants became serfs to be freely bought and sold like any other object of private property: in earlier times they were workers dependent on lords, but not enslaved by them. In the same way it was by highly cultured statesmen like Calhoun and Stephen that the

[1] Code Civil, art. 213 ff.
[2] Hist Jurispr. I, 198.
[3] Cf. above p. 41 n.

theory of the animal nature of negro slaves was proclaimed and defended. In primitive and mediaeval communities slaves were objects of luxury and of casual exploitation. The ordinary organization of exploited labour was based on tributary households endowed with an economic life of their own. The Ϝοικεῖς of Gortyn, the περιοικοί of Sparta rendered work and services to their masters, but were not denied a legal standing and some economic selfgovernment; it is highly characteristic that the Ϝοικεῖς of a Cretan plot might be called upon in case of the extinction of the household to succeed to their masters' property.

In Celtic countries the prevailing system was the grouping of tributary households (taeogs in Wales) into units charged with the maintenance of their lord for a night or several nights (the feorm).[1] In Scandinavian parts tributary families were also assessed to provide certain foodrents, corn and dried fish, and skins (veizlur). Sometimes it is impossible to draw a sharp line of demarcation between dues rendered by free households and taxes and rents paid by tributary rustics. The systematic organization of villainage as to rents and services has often been described. I will just refer to the Rectitudines singularum personarum (Anglo-Saxon, about 1000 A. D.)[2]

The instinct of appropriation manifests itself not only in acquiring things, but also in keeping them. Hence the defence of vested rights: one of the principal aims of social order is the safeguarding of rights acquired

[1] Cf. Stephenson on Firma Unius noctis E. H. R. 1923, April.

[2] Cf. Vinogradoff, Growth of the Manor, 232 ff.

by members of society. Whatever policy may be adopted in this respect — a policy of protection of individual acquisition or a policy of rationing and supervision by the community, the law as to belongings is bound to strive after some form of continuity and security. No social progress could be achieved if the attribution of rights in this respect were constantly subject to disturbances and fluctuations. Apart from political guarantees corresponding to various stages of development the conservatism of property is chiefly supported by the transmission of rights from one person to another in consequence of family affection and ties of kinship.

It is hardly necessary to dwell on the immense distance traversed by mankind since the barbaric beginnings which we have been considering. In order to avoid misunderstanding I may perhaps mention that the activity of the leading political groups in defending and administering a country, as well as the activity of intellectual leaders in promoting knowledge and art, are as much varieties of labour as the work of manual labourers, foremen, clerks, surgeons, traders, directors of industry, etc. The usual restricted use of the term labour is to be explained by the special character of the present social struggle.

II.

The various combinations of elements — occupation, labour and personal superiority account for the legal methods of appropriation as far as personal factors are concerned. But besides personal factors our investigation has to reckon with another set of factors which may

be called objective or material in contrast with the human and personal ones. What I mean is that the law as to property is determined to a great extent by causes which are derived not from the instinct of appropriation but from the requirements of a given task or situation. Each particular task — the building of a bridge, the cultivation of an estate, the management of a factory, implies technical requirements which cannot be disregarded without injury to the enterprise. Therefore the treatment of goods by the persons co-operating in the enterprise has to be submitted to certain conditions for the sake of the fulfilment of the task.

Let us consider these points somewhat more closely. The contrast between moveable and immoveable goods has been the starting point of the law of property in many countries — naturally enough, as it is impossible to deal with land with the same ease as with cattle or money. Land and L ö s a f è are the opposite categories of the Norsemen. The p e c u n i a of the Romans, the S c h a t z of the Germans, the fè of the Scandinavians, the s k o n i t z a of the Slavs point to cattle or tame animals as the standard units of property. Even more primitive habits are revealed in the currency system of the Ancient Russians with its units of the „K u n a“ (marten?-skin?) and of the n o g a t a (the „claw“ as part of a skin?). On the other hand the essential point about land came to be that it could not be disposed of and cut up at random. The tendency in the law of property is to consider land from the point of view of its function in an economic organism. English law makes even now a fundamental distinction between real

and personal property, and subjects the former to limitations which are inconceivable in regard to the latter, (entails, land settlements). The practical sense of Roman lawyers did not fail to suggest to them that the contrast between immoveables and moveables did not coincide with the difference between a number of *jugera* and a sum of money The *fundus* (estate) had to be fitted out with a certain stock (instrumentum fundi) — beasts of burden, tools, seed, labourers. Such goods had some value as single objects, but their chief destination was to supplement the economic unity of the estate and they were therefore included in the notion of immoveable property. They become — according to French terminology — *immeubles par destination*. Similar consideration would be given to a house as a fully furnished homestead or dwellingplace To what extent such legal treatment depended on the cultural level of the population and its economic conditions may be further illustrated by the contrast with ancient Germanic law which treated the house as moveable property, evidently in view of a traditional habit of erecting light huts in the course of frequent wanderings and transporting them from place to place.

The necessity of treating land not as an accidental aggregate of pieces of soil, but as the basis for organic entities capable of maintaining themselves in the economic world led to consequences of the greatest importance. The history of Europe during the Middle Ages is dominated by the economic and juridical formation of the *holding* — the standard plot capable of maintaining a normal family of workers and yielding a certain surplus of services and income for the benefit of the

protective military class. The hiwisk and hide of the English, the sulung of the Jutes, the ból of the Scandinavians, the Hufe of the Germans, the mansus of the Romance populations were all constituted for this fundamental purpose. Some of these organic units may be occupied by free men (socmen), others by semiservile tenants (mansi lidiles), others again by serfs (mansi serviles). Some appear in countries living under Germanic or Celtic customary laws, others have come down from the time of the Roman Empire, but all are characterised by the same main features: land is not distributed into chance clusters of acres, but organized into homestead plots; the unity of these plots is kept up as far as possible in spite of the accidents of succession and transfer; this unity is suggested not by varying calculations of superior rulers, but by the requirements of the economic practice. The Saxon hide appears as the land of the largest plough (8-oxen team), the oxgang as the plot corresponding to the labour of one ox — the smallest possible fraction of a plough team, — the yardland as the ordinary outfit of a peasant family of some four or five persons (husband, wife, two or three children). The survey of St. Germain des Prés (Polyptique d'Irminon) provides us with the customary standards of VIIIth century Gaul. Are these homesteads the outcome of skilful devices by practised stewards of great landowners? There can be hardly any doubt that — apart from occasional clipping and regulating — the origin of the standard holdings is to be sought in the requirements and customary self-government of rustic populations in the various countries. The clinching argument is provided by cases when these

standard homesteads arose in countries where lordships and stewardships were not normal institutions in the legal organization of the land, where the peasants acted in their own right. One of the most striking cases is furnished by Scandinavian countries. The Swedish provincial laws contain detailed instructions as to the formation of homesteads consisting of dwellings, orchards and fields. I may refer e. g. to Östgötalaga.[1]

The Norse homestead, the gaard, is not cut to definite standards in this way because the land was as a rule settled in single farms and not in villages, but the objective tendency towards an economic unity is apparent in the wellknown rules for the traditional continuity of the organized husbandry of the ódal — the renunciation by some of the co-heirs in favour of one brother and their going out with a certain agreed or customary outfit similar to the dower portion of the daughters. We find a contrast between northern customs (Scandinavian, English, German) and southern practice (Italy, Southern and Central France). In the latter case the cultivation of the vine and the olive as well as the greater intensity of agriculture opened the way for a great morcellation of property and prepared for the legislation of the Code Civil with its rules as to obligatory partition among heirs.

The pressure of economic aims on the construction and treatment of property is clearly noticeable in the above mentioned cases. The observation may be generalized in the sense that any definite enterprise carries its own technical requirements in the course of

[1] Schlyter, Sveriges Gamle love, II, 189. Cf. Erik's Sjællandske lov, II, 55, 56.

its achievement. These requirements do not by any means coincide with the personal interests of those engaged in the undertaking: they may even stand in opposition to them. The miners who are working in a shaft for coal have to submit to discomfort and danger in order to obtain the valuable material from the depth of the earth. Insistence on the aspect of personal profit or benefit may sometimes hamper the efficiency of the performers and the success of the performance. The complaints of employers as to ca' canny labour are too well substantiated to be dismissed as a pure calumny. According to Mr. Drower, a recognized expert in questions of building, „Every job of any size is under the supervision of shop stewards, who settle what they consider a proper day's work should be. The number of bricks varies with the sort of work; it may be as low as 300; it may be a good deal higher, but it is always too low. Just at present men are working very badly when under shop stewards.“ [1] If we look at cases of technical success we shall find, I think, that a very large place must be allowed to proper co-ordination and to skilful leadership. No enterprise on a large scale, especially no original and novel undertaking, can be carried out by mere accumulation of material and labour — knowledge, imagination, judgement, willpower, energetic effort are indispensable for great tasks. This is the reason why European civilization has been brought to its present height by combinations of individual effort and why such a great share has been claimed and obtained by leaders in politics, industry and commerce.

The most striking manifestation of the power of

[1] See letter published in The Times for Jan. 5th 1925, p. 13.

objective factors is presented by the problem of capital. Its germ may be found in the most primitive tribes in the shape of the reserves of food accumulated by the women in view of the expected lean seasons: the idea of withdrawing provisions from immediate consumption for the sake of future requirements may be regarded as the earliest application of *thrift*. Later on thrift comes to be the chief means of building up capital: the reserved goods are not only used *for deferred consumption* or *as insurance* against the risk of starvation, but as a means *of production*. And it is in this form that they enter on a fateful course of development. No industrial or commercial undertaking, if not a gambling venture, can be conducted without a reserve fund of goods or money at the back of it; in a sense the products of any economic undertaking are the profits or income derived from turning over reserved goods to productive uses. Thus the objective factor of the capital or fund enters as a necessary element in a combination with labour of various kinds to ensure production. The share of the result to be assigned to each factor may be estimated in various ways — it may be calculated on the basis of purely objective data, without any consideration for the fact that „labour" is not an exertion of impersonal force, but a sum of human efforts. Or else the relative rights of capital and labour in production may be adjusted with a view to harmonizing their action so that the human elements of labour shall not be enslaved by the objective weight of capital and, on the other hand, so that the objective requirements of the task shall not be obstructed and defeated by onesided insistence on human claims. Prob-

lems of this kind are not easy to solve and we know too well that they may result in a tug-of-war injurious to production as well as to producers. It is not my object, of course, to enter into a discussion of the economic and social side of the problem. But it may not be amiss to point out that the juridical treatment of property is intimately connected with the economic and social aspects of any historical situation. In barbaric society, for instance, as represented by Celtic tribal custom, the standing of tenants depended on the amount of livestock which had been lent to them by the chief, as capitalist.[1] In Ancient Russia serfdom of the glebe was to a large extent the consequence of the indebtedness of peasants to wealthy lords for the stocking of their farms. The bail à chaptel in France and the mezzeria tenancy in Italy were also connected with loans of agricultural capital by landowners to needy tenants. On the other hand, organized labour as it exists in our time is apt to urge the claims of the human factor in such a way that the interests of productive industry are consigned to the background. In the tug-of-war between workmen and employers it remains to be seen how far devices of nationalization which occupy such a large place in Socialist programmes can help to solve the problem in overcrowded countries. Even if society were turned into an economic army with prescribed services, prescribed rations, prescribed entertainments and prescribed rest, the requirements of production could not be fixed permanently in view of the needs of a growing population, foreign competition, and the eventualities of great technical changes.

[1] Maine, Early Institutions, pp. 151 ff.

A fierce controversy has been raging between scholars who trace the development of private property by gradual steps from a primitive state of communism and writers who contend that savage tribes were quite familiar with the appropriation of the soil by individuals It seems to me that those disputes are largely the result of misunderstandings. Neither downright communism nor absolute property can be attributed to primitive people; but it is essential to realize that the elements of individual appropriation and of public authority were conceived in early days in a manner different from that in which they are co-ordinated now. Private appropriation was weaker while the authority of the tribe, of the kindred, of the township was stronger, went deeper, and came more conspicuously into play.

III.

We have been examining the factors and methods of appropriation Let us now take up the subject of the means by which rights of property are defended and enforced.

Selfhelp and self-redress are characteristic features of early societies in which public authority is yet slight and chiefly directed towards protection against foreigners. Such selfhelp had to be legal in motive and form and he who resorted to it was bound eventually to justify it before the court or council wielding judicial authority. But the initiative in the defence of a claim of right was left to the party. I may just refer in illustration of the process to the well known procedure by manus injectio or by pignoris capio in Roman law. The latter method found abundant application in the

English law of replevin — the impounding of animals causing damage to property by the owner of the estate, field or wood, as a pledge for obtaining compensation. The release (replevin) of the animal had to be obtained after a discussion and adjudication of the claim. The Roman procedure in case of theft deserves some explicit notice. The examination of the texts by recent writers[1] has shown that action against thieves in ancient law usually took the form of self-redress. A thief caught stealing at night or offering resistance to arrest could be slain with impunity by the aggrieved person (Festus). A thief trying to escape with the stolen property about him,[2] if pursued and caught, was subject to detention (deprehensus) and had to pay a fine of four times the value of the object stolen in order to liberate himself.[3] If the thief was not caught in fresh pursuit but it was suspected that the stolen property was concealed in his home, his house was to be searched (cf. the Greek φώρα) and the search was effected by the owner of the property. The customary law of Rome as described by Gaius imposed, however, requirements which seemed „ridiculous" in later ages, but were evidently intended to serve as guarantee that the search would be carried out without violence or fraud.[4] The

[1] De Vischer in Revue historique de droit, IV série, I, 461, 481f. cf. Huvelin, Furtum, (passim.)

[2] I agree with M. de Vischer that the expression „fur manifestus" points to a thief carrying stolen property, the handhabbende [og back baraende] of Old English law.

[3] Festus from the XII tables; cf. Pollock and Maitland; II, 495 ff.

[4] Gaius, III, 186 f. 191 on procedure lance et licio: the searcher must be naked, except for a loincloth, and carry a platter.

method of self-redress still holds good in English law in cases of forcible ejectment of trespassers and of forcible entry in order to remove fresh „disseisin" of immovable property or obstruction of right of way or private road. The juridical interest of such proceedings lies in the fact that they illustrate the significance of the element of claim in the formation of a right.

At the same time the assertion of right by private initiative requires some form of recognition on the part of the community. In early law such recognition is expressed by general approval of the action of an aggrieved person and condemnation of the offenders which may culminate in a declaration of outlawry — a most serious sanction putting the criminal on the level of a wolf (caput lupinum, varyr), depriving him of intercourse with fellowmen by the symbolic interdiction of fire and water, driving him into the forest (skógarmaðr). The social reaction by „outlawry" is inseparable from systems in which selfhelp plays the leading part. In a sense it may be regarded as an indication that law is more ancient than the organized State: the criminal is faced directly by public opinion. The method of legal selfhelp combined with outlawry is gradually replaced by direct intervention of public power. A good illustration of an intermediate stage is presented by the procedure of intertiatio described in the lex Salica (de vestigio minando). A man whose cattle have been lifted starts in pursuit following the tracks of the culprits. If he catches them and recognizes his beasts he asserts his claim but does not immediately take possession if his claim is denied: the cattle are placed in the safe keeping of a third party and the matter in

dispute is submitted to the decision of the popular court (the rachimburghs) and the defendant may produce an „auctor" (warrant) from whom he has acquired the beasts, in order to exculpate himself from the charge of theft. A further manifestation of the coming into force of public justice is to be found in Frankish law in the practice of the bannus, the special command of the King by which certain persons, relations and claims were put under direct Royal protection and swift and effective executive action of the government was substituted for the uncertain course of self-redress.

We may turn now to the social conditions under which the law of property has progressed through the ages. It has undoubtedly experienced very profound transformations in keeping with the changes in social organization. It will be sufficient for our purpose to consider four principal stages of this evolution — the formation of property in tribal and communal surroundings, the application to landed property of the notion of tenure, the sway of individual appropriation and the restrictions which are being imposed on such appropriation by collectivistic tendencies in modern society.

There can be no doubt, I think, that the history of property starts from situations in which land was appropriated by tribes or kindreds as a territory for their wanderings and shifting settlements. As Sir James Frazer[1] has put it, the absence of individual ownership in land is a necessary consequence of the roaming habits of hunters and nomads, and even when tribes actually

[1] Folklore of The Old Testament, I, 452.

strike root, as it were, in more or less permanent settlements and take to agriculture their traditional conceptions and habits give way by slow and gradual adaptation to new economic ends. Undoubtedly, if a single man — or a single household — had invested labour in a piece of land for the sake of raising barley or rye, he would defend his „work" (opera) from outsiders, claim and obtain recognition of his better right from the neighbours or the tribe. The Law of Manu assimilates tilled land of this kind to the game acquired by the huntsman's arrow. In Russian custom the pioneer claimed as belonging to him the ground cleared by his axe and tilled by his ploughshare. But primitive cultivation is apt to be casual and unstable, and even in fairly advanced mediaeval custom we discover many indications of the fact that it was not the land as such, but the harvest that was considered as belonging to the individual tiller (Narada). In French custom the occupation of land was governed by the prescription of a year and a day; safeguards were provided against the loss of a harvest by the cultivator, but if he left the soil untilled for a year and a day, he ran the risk of another man occupying the plot with impunity.[1] Corresponding rules are found in Danish and Swedish custom in regard to „Bifang" — plots occupied for cultivation in the waste pasture in the common wood (almening) near a village for 12 years: in six of these the field was to be under crop and during six to lie fallow. Within the bounds of the village the common could be occupied for cultivation only for six years, three being reserved for fallow.[2]

[1] Viollet. Etablissements de St Louis, I, 110.

[2] Uplandsl. V. 21.

The superior right of the tribe and of the township or units which take its place in process of time is sufficiently reflected in the Mark- and Dorf-arrangements of Germany, especially in the Weisthümer published by Grimm and his school. But as the subject has been obscured rather than cleared up by endless discussions, it is preferable to examine Scandinavian evidence, which happens to be very explicit and is free from the complications produced by the mixture between Roman and Germanic culture in the West of Europe.

The economic importance of the common waste (almening) is dependent in these countries on the great extent of waste land and of the peculiar dualism of pastoral habits, especially in Norway and in Iceland. The Gulathingslov recognizes the right of every man to use the common forest of the folk for pasture and fishing (vatz og veð — Gulathingsl. 145). In the summer up to present times the cattle are driven on to the slopes of the mountains covered by fresh grass, and the owners of the cows and oxen set up their bungalows (sel, saeter) wherever they like.[1] In this way in Scandinavian parts as well as in the Alps the use of the almening may be regarded as connected by continuous tradition with primitive customs of land occupation. The peasants (böndar) of the hundreds in Sweden and of the herrads in Denmark appear as owners in common of the undivided pasture and woodlands of their districts while the community of neighbours (grannae) has a right of eminent ownership in the land in the villages. This ownership finds expression in many directions. I may cite as particularly

[1] Frostath. XIV. 8; Haff. 72.

characteristic the admission of outsiders to the use of pasture and wood in the village common with the consent of all the „neighbours“ [1] — a rule which reminds us forcibly of the Lex Salica de migrantibus; the procedure of admission by solskift with a view of equalising shares of the homestead areas (tofts) with very detailed instructions in the Swedish and Danish laws; the liability of the entire village to fines and the action of the whole village in the prosecution of claims and as defendants in trials, coupled with leave for single members to avoid taking part in such action provided they submit personally to the charge or recognize the claim of the adverse party. [2] These rules are significant as indicating the stage of development which had been reached by mediaeval village communities. There can be no talk of juridical persons in the sense of entities with a complex of rights clearly distinguished from that of the single members: such abstract conceptions are not in keeping with the eminently concrete way in which juridical relations are treated by peasants. Nevertheless, the union of the grannae can hardly be conceived historically as a free co-operative association of individual farmers, although it may have assumed this aspect in course of time under the influence of modern individualism. [3] The stress lies on the unity of purpose and feeling which prompts the action of the community as a whole. Unanimity is not a rare and exceptional out-

[1] E. Sjel. L II 58; Haff. 197.

[2] Haff, 202—204; Sk. 1. 71; E. Sj. 1, III. 64.

[3] Cf. Østberg, Grænd og grændelag (Ny Jord, 1920. N 2 og 3).

come of deliberations, but a normal requirement for decision.[1] The principle appears contaminated when the single householder is allowed to withdraw from common action by refusing the oath or submitting to taxation whithout contesting the order.

The form of settlement is, of course, of capital importance in shaping the law of property at any time and more especially under tribal and communal conditions. The single homestead system as practised in Norway, in the North of England, in Southern Russia, leads naturally to individualistic occupation in the field, while settlement in villages is favourable to the maintenance of communal customs and traditions. I will deal mainly with the second eventuality, and this for two reasons — it is less familiar to our generation, and it was the most usual one in Northern and Eastern Europe. Let us notice, to begin with, that meadows were generally considered from a special point of view — as a rare commodity, the appropriation of which by single individuals was regarded as invidious and unjust.[2] We find everywhere the expedient of parcelling meadows into strips to be apportioned by lot to the householders of the village community (Lammas meadows, e. g. Yarnton, Oxon). As regards the arable the developments of customary law

[1] Gesammte Hand. Cf. Gierke, in Essays in Legal History.

[2] Cf. gedalland which has to be protected by fences. Laws of Ine. 42. If ceorls have common meadow or other land divided into strips to fence, and some have fenced their strip, some have not, and . . (stray cattle (?)) eat their common acres or grass, let those go who own the gap, and compensate the others who have fenced their strip . . . .

diverge in a marked manner. In countries like Wales, where pastoral pursuits were favoured by geographical conditions and held their own for centuries, we find a curious custom of alloting a few acre-strips — 4 erwe — to every freeborn Welshman. [1]

This can be explained on the supposition that the scanty agricultural outfit was only considered as supplementary to pastoral life and work and was probably destined to enable a man to start his separate house and orchard or kitchen garden (Cf. the Roman heredium of two jugera). On the contrary in Anglo-Saxon England, in Denmark, in Sweden, in Germany, the close settlements in township, by or Dorf led to elaborate systems of open-field cultivation and appropriation (Feldgemeinschaft). I have dealt at length with the English variety of the openfield arrangements in my works on Villainage and on the Growth of the Manor and I wish only to underline one or two facts. Openfield cultivation with its intermixture of strips and compulsory rotation of crops does not imply periodical redistribution by the village community: it existed for centuries in Northern Europe (including England and Germany) in connection with stable homesteads and a permanent attribution of certain strips to each of them. But the notions of communal solidarity and communal authority in regulating economic practice are manifest unmistakably even in those cases, not only in the removal of fences and individual boundaries when the fields lie fallow and are thrown open to cattle for pasture, but also in the

[1] Seebohm, Tribal System in Wales p. 92. Cf. Vinogradoff, Outlines, I, 284.

formation and tenacious maintenance of more or less equalised holdings (Hufe, virgate, ból) and the occasional recourse to some procedure for the re-establishment of equalized and proportionate rights.[1] In some cases, as in Sweden, Denmark, Friesland and parts of Germany, such communal arrangements are independent of any interference on the part of feudal lords; in other cases, as in England, in Western and Southern Germany the overlordship of superior owners is the rule, but it is obvious that even in these latter cases it would be wrong to derive the openfield practices from the commands and interests of the lords and their stewards. Exploitation by way of services and rents does not in itself create the peculiar arrangements for co-operation and economic management which were the daily routine of openfield husbandry; we have to look to the meetings of the neighbours (grannae) and to the customary courts of English manors, as described in Court rolls and Weisthümer in order to obtain a clue to the appropriation of land under the openfield system.

There can hardly be a doubt that the mediaeval arrangements of peasant landholding on such lines were gradually developed from origins in which the communal features were much more clearly marked. The famous descriptions of the state of agriculture in ancient Germany contributed by Tacitus apply to a nomadic or semi-nomadic culture in which land was taken up for cultivation by the whole tribe (universi). After distribution among the groups settled in various localities appropriation was effected by each group by raising crops on convenient plots and putting the fields

[1] Villainage in England, 233 the redivision in Segheho, Beds.

under cultivation with frequent changes. Not all the details of this description are equally convincing; one may express a doubt, for instance, as to the yearly changes of cultivated fields. But in the main there is no reason for rejecting this evidence, and students of field systems have found a place for the method of cultivation which forms its economic basis among the systems in practice at the present time or in the recent past. G. Hanssen has identified it with practices of „Feldgrasswirtschaft."[1] Prof. Arenander[2] has called attention to the widely spread process of preparing forest soil for cultivation by burning the trees and underwood in certain areas — the Svedia renth of Scandinavian countries, the Rode (renth) of Germany. The process itself has been described to him in a very interesting account by an old peasant from Harjaland (Sweden). It is effected in two stages — the cutting down of trees on the lines of a square which marks the limits of a certain area in accordance with traditional measurements, to be followed by a series of similar cuttings along a straight line; then, in the next year, when the cut trees are sufficiently dry, the setting fire to the forest growth within the marked squares. It is a necessary feature of this operation that it should be carried out under experienced leadership and by the whole body of the neighbour-union; any attempt on the part of individual householders would evidently be fraught with common danger. And indeed Swedish and Danish provincial laws forbid ex-

[1] Schrader, Reallexikon, p. 13 ff.

[2] Germanernas jordbrukskultur omkring Kristi födelse (Berättelse over det Nordiska Arkeologmötet i Stockholm, 1922).

pressly any adventure of this kind — clearing by fire is essentially a communal undertaking. The object of the clearing by fire may have been sometimes the preparation of the ground for permanent settlement or cultivation, but the burning of woods was also often used to obtain quick returns of crops on the soil manured by charcoal. In Norway and in Sweden the process has been known to be employed in the shape of a systematic rotation between areas subjected to tillage for approximately forty years (Arenander).

Another important variety of communal organization is presented by nations which have kept up through ages the principle of kinship as the basis of society. The Celts, the Southern Slavs and the Hindus provide examples in point and I have treated of all these cases in my Outlines of Historical Jurisprudence, I; and of the Celtic arrangements particularly in the introduction to the Denbigh Survey. I should like to call attention to an interesting feature of this mode of dealing with property.

One of the principal objects and duties of the patriarchal communities on the Mitákshará pattern as well as of the matrilineal tarwads of the Malabar coast is to assure maintenance to their members. For this purpose the ancestral stock of land and goods is protected as far as possible against dispersion by spendthrifts or improvident managers; alienation or mortgage of ancestral property cannot be effected without a decree of the family. On the other hand, every individual belonging to the great family union can claim support from the community not only in case of starvation or destitution but for purposes of edu-

cation, setting up in trade, etc. Some of the cases arising out of such claims in Indian courts are highly characteristic of a conception of property entirely foreign to our private law.

Writers who have had to deal with such situations have often simplified their task by treating the superior free tenure as the one and only form of property, and the language of the documents lends itself to some extent to such a simplification: in the case of the English bócland it is borrowed from Roman sources. But on closer consideration we notice that the problem is more complicated. If I may be allowed to use an expression of mediaeval law — the two sets of people have different „estates" in the same land: one occupies it and holds it for exploitation by peasant labour, the other occupies and appropriates it for direct cultivation. It is at bottom the same differentiation of the right of property which obtained in the higher social sphere of lords and tenants under the names of holding in domain (in dominio) and holding in service (in servicio). Another way of expressing the duality of the conception was to say that the tenant had the dominium utile, the lord the dominium eminens. Of course these terms were used technically for relations between lords and free tenants, but they may be used by analogy to illustrate the dualism in the rights and interests of tenants in general, including customary and unfree tenants. The interest of the cultivators was ultimately recognized in England in the XVth century by the extension of Royal jurisdiction to protect copyholds, but it is obvious that such recognition followed a long period

of application of customary rules. The „customs of the manor" were formed in practice before they could be recognized by the Courts. And it is instructive to note that agrarian customs were not materially different in places occupied by „villains" and by freemen — the socmen of England or the peasants (bønder) of Denmark. The lords were undoubtedly able to exercise occasional pressure and made their influence felt by developing central offices, home farms, parks, but by the side of these growths[1] existed the homesteads and holdings of the rustics, and the life of the latter was regulated by downright customary law, administered according to forms similar to those which obtained in Royal tribunals.[2] In Russia this characteristic dualism was reflected in a quaint saying current among the rustics: „we are yours, but the land is ours", and when the squires attempted to turn these customary relations into a kind of slavery the legal structure of „servitude of the glebe" was undermined and had to be abolished by the State.

Historically the principle of tenure corresponded to a state of society in which a military class was superimposed on a labouring class, for the protection of the latter: there was reciprocity between the rights and duties of the members of these social strata. The most appropriate economic basis for such an

[1] The dualism of the conception and terminology of property is clearly expressed in German „Weisthümer". E. g. Heusler, Institutionen des deutschen Privatrechts, I, 33 n. 2.

[2] Miss Levett on Manorial Courts of St. Albans. Transactions of the Royal Historical Society, 4th Series. Vol. VII. Cf. above p. 31 n 2.

arrangement was provided by natural husbandry with a customary balance between vested interests and traditional work. The mobilisation of economic enterprise in town and country, the rise of industry, of farming on lease, of widespread commerce rendered tenurial customs unnecessary and irksome, but the juridical forms and remedies developed in the feudal epoch maintained themselves tenaciously in new surroundings. The stages of their gradual disruption in England are marked by the labour legislation of the XIV century, the enclosure movement of the XVI, the abolition of military tenure in Charles II's reign, the coming in of free trade in the XIX century. And yet some feudal terms have survived up to now — we still speak of freehold, of fee simple, of the eminent domain of the Crown. These terms are of some use in as much as they remind us of the fact that property is not an absolute and unvarying conception, but may be differentiated and graduated in accordance with historical conditions.

It has been noticed already that chattels are appropriated by individuals from the earliest times, but as regards land the manifestations of individualism in the law of property are connected with the increased intensity of cultivation. When men have sunk labour and capital in a plot they expect naturally to keep it for themselves and for their nearest. Countries of Southern Europe where intensive agriculture was favoured by mild climate, a fertile soil and concentrated settlements proved particularly adapted to the development of individual ownership. The Roman case is well known, although the exiguous dimensions of the an-

cient „heredium“ suggest the inference that originally the husbandry of the Campagna was a pastoral one, with small cottages and kitchen gardens as „points d'appui“ (Mommsen). However this may be, the sturdy stock of Roman peasantry soon appropriated the country and pushed forward into the neighbouring regions their system of surveyed fields with its closely fitting holdings, adapted to the laborious work of the two-oxen plough, with an early development of agriculture and horticulture.[1]

The corresponding construction of real property gave the paterfamilias, the householder, an absolute right of disposal — the jus utendi, fruendi, abutendi culminating in the conception of dominium. This fullest right was claimed ex jure Quiritium, and protected by an action of rei vindicatio. When the horizon of the Roman world widened and all sorts of foreigners were drawn into its range of intercourse, the ancient modes of transfer by mancipatio and jure cessio were supplemented by informal modes of acqusition by traditio. Restrictions could be imposed, of course, by public authority (e. g. D. XVIII, 1, 52), but they were exceptional and did not diminish substantially the absolute character of „dominium“.

The complement of direct acquisition jure Quiritium was usucapio[2] — acquisition by undisturbed usage of land or goods the ownership of which had not been obtained by a legal act — either a grant at public law or by legal inheritance or transfer from a legal owner. The most common case in Roman practice was acqui-

[1] Bonfante, Storia del diritto romano, I, 169.
[2] Buckland, Text-book of Roman law, 242.

sition in good faith from one who was not the owner. Such an acquisition was rendered complete by usus in a year in the case of moveable goods and of five years in the case of land.[1] The aim was obviously to cut short as far as possible the state of uncertainty which might result from transactions concluded without oldfashioned formalities. Prescription directed against belated claims to ownership, although a purely procedural device different from usucapio, served also the purpose of social peace. In so far both methods are characteristic of an important aspect of the law of property: it prevents a frequent reopening of disputes and struggles that would be intolerable in an orderly community.

The restriction of absolute ownership in English law is strongly expressed in matters affecting public policy. Take the growth of the rules against perpetuity. As soon as devises of land by will were fully recognized by common law it was found to be unreasonable to let testators dispose of their real estate in a way which would fetter all succeeding generations. The principal rule was gradually elaborated as stated, e. g., by Gray: „No interest is good unless it must vest, if at all, not later than twentyone years after some life in being at the creation of the interest."[2] The motive for the rule was well stated by Jekyll, M. R. in Stanley v. Leigh (1732) 2 P Wms 686: as „the mischief that would arise to the public from estates remaining for ever or for a long time inalienable or untransferable from one hand to another being

[1] XII tables rule cited by Cicero, Top. IV. 23.

[2] J. Gray, Rules against perpetuities, 2nd ed., 164.

a damp to industry and prejudice to trade." The object of the rule — to facilitate transfer of land — is inspired by individualistic policy, but at the same time it restricts the liberty of testators to do what they like with their property to a power of disposal deemed reasonable and not injurious to future generations.

The strict Roman system with its logical submission of all minor rules to the idea of the absolute quasipolitical authority of the paterfamilias, had to be modified already within the Roman Empire thanks to the influx of Hellenistic civilization. In the interest of intercourse various forms of derived possession were engrafted on the rigid stock of Quiritarian doctrine. They reached their highest point in „emphyteusis", a form of tenant right endowed with most of the privileges of ownership — permanency, the right of action in courts of law, the actual use of land for cultivation and profit, the nominal character of the rent to be paid to the legal owner. The number of public and private servitudes (jura in re aliena) was considerably increased, and altogether public and social pressure resulted in the limitation of individual „dominium".[1]

Even greater concessions have been urged and granted in mediaeval and modern Europe. The main point of contention between the views of Romanists as represented by Windscheid on one side and Germanists led by Gierke on the other bore on the opposition between absolute ownership, existing in Roman law, and ownership restricted in various ways in

[1] Bonfante, op. cit. I, 179 ff.

juridical sources of purely Germanic origin. Gierke looks upon various restrictions imposed on owners of land not as on exceptions grudgingly conceded out of considerations of police, but as on the results of the notion that land ought not to be appropriated by single persons for their arbitrary use. Hence the admission of farreaching limitations in the interest of neighbours, the imposition of extensive „real charges" (Reallasten) not necessarily originating in agreement, but derived from customary arrangements.[1] The controversy is interesting in so far as the Germanistic theory, though not free from a confusion between mediaeval principles and supposed peculiarities of the German national sense of right, certainly testifies to the treatment of property as a compromise between individual interests and the requirements of society.

Gierke's polemics were conducted in a spirit distinctly hostile to unrestricted individualism in the law of property; without professing an allegiance to socialism he was inclined to lay stress on the importance of control of the appropriation and use of goods by the community. The line he takes in his works is interesting as marking a theoretical transition from the doctrine of individualism to collectivistic conceptions. On the practical side a similar conflict of compromises and ideas has been described in Dicey's masterly work on Law and Public Opinion. The impact of socialistic tendencies in our age is so clearly realized in all directions that it is not necessary to adduce proofs of its existence. The rising of the tide may be attributed not only to the increased consciousness and

[1] Gierke, Entwurf, 323 ff.

organization of the labouring classes, but also to the „stinting", the „rationing" of material resources in consequence of the growth of population and altered standards of living. The claims of maintenance, of minimum wages, of improved housing etc. proceed from congested masses excited by the spectacle of luxury and idleness on the part of a minority whose title to a privileged position is denied or has become obliterated. In a way similar to the stinting of pastures and redistribution of meadows in old days, a certain rationing in the appropriation of goods does not seem out of place from the point of view of public policy as well as of justice; the danger is that the growing pressure of social claims may injure the efficiency of productive enterprise and obscure the importance of the objective requirements of every task — in business, in politics, in theoretical thought.

In conclusion I should like to call your attention to a striking illustration of the conflict of principles in the modern law of property. It is presented by the juridical controversies raging in the United States. The Constitution of 1788 had been drawn up in the light of XVIII century political science and contained sanctions of the individualistic principles as regards absolute freedom of contract (Art. III, 8, 9). The first ten amendments passed under the influence of Thomas Jefferson emphasized this individualistic tendency in a way that reminds us of the French Declarations of Right.[1] The fifth amendment in particular enacts that „no person shall — — — — be deprived of life, liberty, or property without due process of law; nor

[1] See Lambert, Le Gouvernement des Juges, 1912.

shall private property be taken for public use, without just compensation". (Art. V).

After the breakdown of the secession movement of the Southern States one of the amendments passed in the era of reconstruction, the fourteenth, applied the same principle to the jurisdiction of single States.

„All persons born or naturalized in the U. S. and subject to the jurisdiction thereof, are citizens of the U. S. and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U. S.; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Art. XIV Sect. 1). This latter amendment was introduced with the special object of protecting negroes in the States which had fought for slavery, but in practice it opened the way for the intervention of Federal Courts in disputes arising from the legislation of separate States in all matters concerning individual liberty, freedom of contract, and property. The vague expressions — liberty, property, due process of law — had to be interpreted and applied by the Supreme Court in the last instance, in a variety of cases, in which individuals deemed themselves aggrieved either by substantive Acts or by methods of procedure. Constant litigation has been conducted in these respects because standard principles accepted by individualistic jurisprudence were and are being subjected to revision from the point of view of public health, social justice, a public policy directed to the protection of the weaker members of the com-

munity — children, women, workmen. We are not concerned with the interesting developments in the domain of contracts and labour conditions, but we ought to notice the characteristic movement of professional opinion in the sphere of property, reflected in the decisions of State and Federal Courts. The general tendency of judicial interpretation was in favour of a strict application of the principle of absolute freedom of use and disposal. As Justice Holmes put it in his dissenting opinion in Lochner v. New York — „the fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics."

We are at the end of our survey. It was not my object in reviewing a number of difficult and controversial questions to present a complete study of the materials at hand and of the arguments which have been urged in favour of various theories. Such a task would have demanded many months. My aim has been to call your attention to the value of comparative investigation in the domain of historical jurisprudence. Even a general survey of the customary organization of the family and of the evolution of the right of property and possession may suffice, as it seems to me, to establish a few general conclusions.

I. In order to understand the process of legal evolution one must consider its modern aspects in connection with its origins and historical changes.

II. The analysis of juridical rules in their logical consequences and relations must be supplemented by synthetic principles connected with notions of value.

III. The standards of utility, morality and justice derived from these estimates of value are not absolute

and vary with the times, but every legal system has to conform in some way with standards of this kind. A marked divergence between positive law and public opinion as to right threatens society with a crisis.

IV. The evolution of the family depended historically on compromises between the interests of the wife and the husband supported by their kinsmen, and on the combination of interests achieved by the raising of legitimate offspring.

V. The evolution of property depends on the security and confidence produced by harmonizing the action of two sets of factors — the human or „subjective" elements of first occupation, labour, and personal superiority, and the objective requirements of the tasks of social co-operation.